



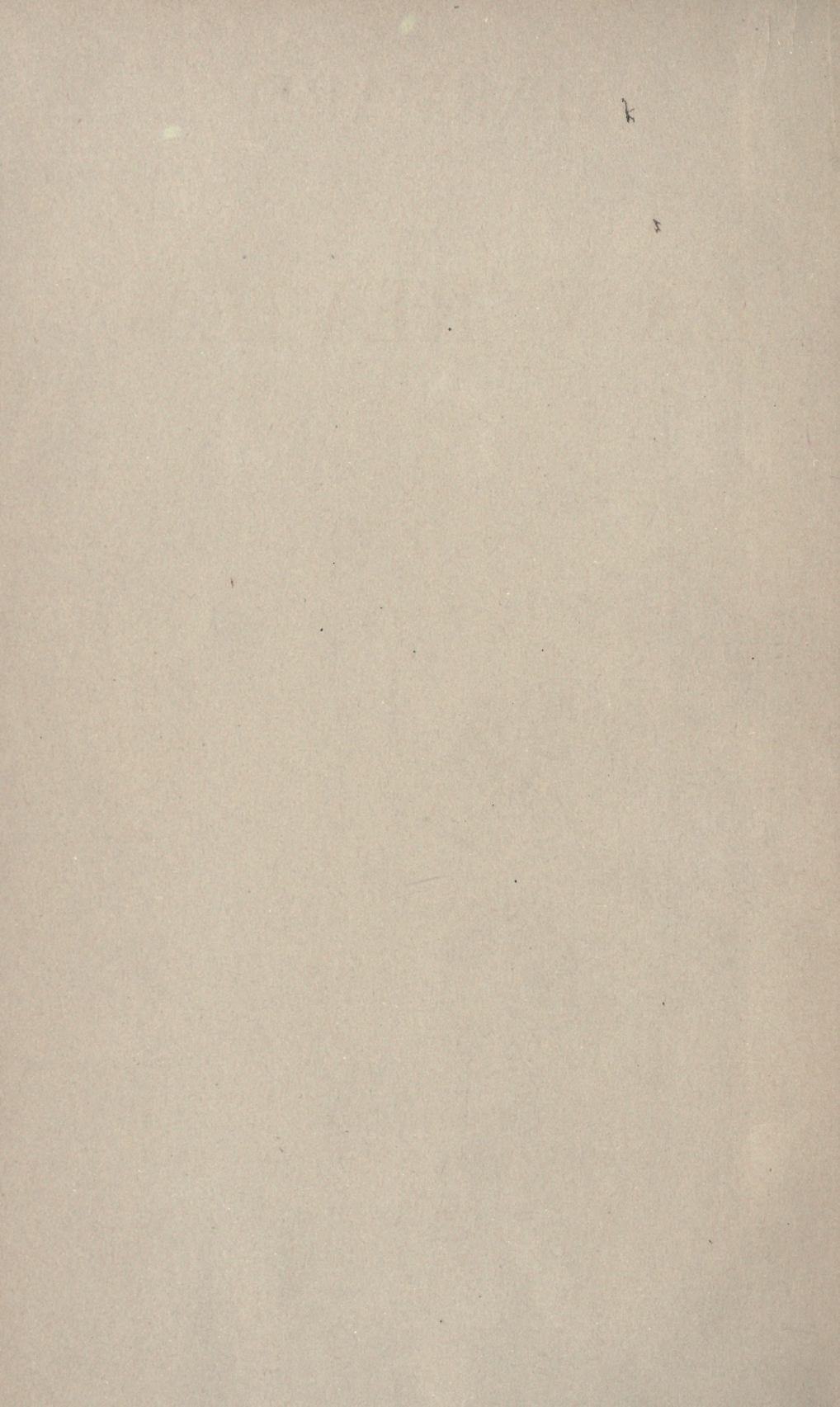
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THE NATIONALITY OF A JURISTIC PERSON.

THE history of a discussion in Private International Law seems commonly to have three periods. The first is the age of innocence, when it has not yet occurred to anybody that a difficulty exists. The second is the age of controversy, when the difficulty has made itself felt, and various solutions of it have been proposed and agitated. The third is the millennium, when all those solutions have been considered, and one has been accepted as satisfactory. This last stage is purely ideal: we may hope that there is a constant approximation towards it in all such controversies, but in none is it ever attained.

The object of this article is to discuss the various answers which have been proposed to the question, What is the essential difference between a foreign and a domestic juristic person? or, to state the question in a more practical manner, What test must be applied to distinguish between a foreign and a domestic juristic person? Amongst English lawyers this question is still in the first period of its history: the recorded decisions of English courts, in which a discussion of the question would have been relevant, either ignore it or apparently assume that everybody is agreed as to its answer. Amongst American lawyers the question may perhaps be said to be in the first period, verging on the second. Amongst lawyers on the continent of Europe it is in the second period, verging as closely as it is ever likely to verge, until it is considered at a Hague Conference, on the third; and it is therefore with the latter, the authorities of France, Italy, and Germany, that we have here most to do.

The inquiry with which we are concerned is commonly described by European lawyers as an inquiry into the nationality of juristic

persons. The use of the word "nationality," however, introduces some danger of confusion. In its ordinary meaning its content is not purely juridical; it is partly political also. To say that one has American nationality, for instance, is to imply the consequence that he has a number of vaguely defined political privileges and duties, such as his right to protection from, and his duty of allegiance to, the state. Whether a juristic person is capable of possessing nationality in this political sense may be open to controversy; but the controversy belongs to political science and public international law rather than to juridical science or private international law, and we are not concerned with it here. It should be understood that when use is made in this article of the word "nationality" in connection with the legal position of juristic persons, the political part of the content of the word is excluded, and it is used to imply only purely legal consequence, — that to the juristic person in question the rules of law of a certain state must be applied as its personal law. It is especially necessary to mark the distinction, because this is precisely the sense in which the word "nationality" is not used by common lawyers. For lawyers on the continent of Europe nationality is the test of personal law; for us that test is domicile, and the word "nationality," deprived of its principal juridical meaning, is used generally by us to express only those political consequences to which reference has been made.

The utmost divergence of opinion has existed about this matter, — a divergence, however, which gives signs of changing into a concurrence in favor of a particular theory to which reference will be made. A convenient method of dealing with the subject will be to consider one by one the various solutions of the problem which have been suggested by various authorities. There is much ground to cover, and in order to do so within the limits of an article, it may be necessary at times to proceed by steps of inelegant length.

I. *A juristic person is domestic in the state in which its members, or a majority of them (or the owners of the greater part of its capital), are domestic.*

This theory is apparently the first which occurs to practical men, and it has met with some support from lawyers also.¹ It is the natural outcome of a certain other theory, as to the nature of

¹ Vareilles Sommières, *Droit International Privé*, Vol. II. p. 78; also, *Les Personnes Morales*, p. 645.

juristic personality, which has its supporters amongst American lawyers. According to this, juristic personality is but a "thin veil" thrown over natural persons, to "unify and condense" them,¹ and "the fact remains self-evident that a corporation is not in reality a person or a thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators."² Others there are, we know, to whom this fact is far from self-evident.³ But the issue between them need not, and could not, be discussed here. It is sufficient to say that the theory under discussion is subject to one fatal objection, that it would be impossible to make practical application of it. The individuals who constitute a juristic person, especially a joint stock commercial association, may belong to many different nations. They are, besides, a changing body. The nationality of the majority of them, or of the holders of the major part of the common capital, may and often actually does fluctuate rapidly. The adoption of the theory would, under such circumstances, result in complete uncertainty as to what the nationality of the juristic person at any particular moment might be.

Such are the practical objections to the theory. From the point of view of legal principle, it can appeal to those only who hold the opinion that "the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it."⁴ Those who hold what we may call the more orthodox opinion, and regard a juristic person as an entity entirely distinct from its members, whether it be an imaginary fiction of law or a real phenomenon of nature, must reject the theory on general grounds. If the personality of a juristic person is a different thing from that of its members, or of any section of them, there is no apparent reason why it should share the characteristics of their personalities in the matter of nationality or in any other matter.

II. *A juristic person is domestic in the state by which it was created (or by which it was expressly authorized).*

This theory has met with considerable support, especially in the United States, where indeed it may be said to be the accepted doctrine. Since the decision in *Bank of Augusta v. Earle*,⁵ American

¹ Vareilles Sommières, *supra*.

² Morawetz, *Private Corporations*, § 1; cf. also Taylor, *Private Corporations*, § 60.

³ Cf. Maitland's *Introduction to Gierke's Pol. Theories of the Middle Ages*, xxiv.

⁴ Morawetz, *Private Corporations*, § 1.

⁵ 13 Pet. (U. S.) 619; and see 20 HARV. L. REV. 78.

lawyers have been committed to the theory that the personality of a corporation is a fictitious creation of the state, and exists only in contemplation of the law. The courts in determining the nationality of corporations have proceeded *a priori* from this principle, and appear never to have doubted but that the state in which a corporation is domestic is that which "created" it, and that the rules of law of that state constitute its personal law. Thus we find it said that "in the jurisdiction of the United States a corporation is regarded as in effect a citizen of the state which created it":¹ for the purposes of federal jurisdiction a corporation is regarded as if it were a citizen of the state which created it;² and again, in cases relating to the consolidation of two or more corporations by the legislatures of two or more states, it has been repeatedly said that the effect of the consolidation is to create two corporations, one of which is domestic, in each of the consolidating states, *because* it derives its powers from and is created by that state.³ Apart from such express decisions, the theory is tacitly assumed in almost every case relating to foreign corporations.⁴

The theory is assumed, moreover, as one adequate to account for the nationality of any and every juristic person, and in this respect there is an important distinction between its American adherents and its adherents on the continent of Europe; for by the latter it is admitted that it can only be applied to those juristic persons which have received some express authorization from the state. Nothing is easier, it is said by them, than to determine the nationality of juristic persons which have received such an express authorization, for the state in authorizing them imparts to them its own nationality.⁵ But it is otherwise, they admit, with regard to

¹ *St. Louis v. The Ferry Co.*, 11 Wall. (U. S.) 429; and see *Louisville Ry. Co. v. Letson*, 2 How. (U. S.) 558.

² *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65. See also *Ohio & Mississippi R. R. Co. v. Wheeler*, Black (U. S.) 297. (a) Citizenship for the purposes of determining the jurisdiction of federal courts is not, of course, the same thing as nationality for the purposes of determining the personal law; but they are inseparably connected. (b) Owing to the early decisions that a corporation is not a citizen, it has been found necessary in these cases to invent the fiction of a conclusive legal presumption that the members of a corporation are citizens of that state alone in which the corporate body has its existence; but the substantial effect of the decision is as above. See *Muller v. Dows*, 94 U. S. 444.

³ *Muller v. Dows*, 94 U. S. 444.

⁴ *Cf. Steamship Co. v. Tugman*, 106 U. S. 118; *North Noonday Mining Co. v. Orient Mining Co.*, 1 Fed. 522.

⁵ *Cf. Weiss*, Vol. II, p. 392; *Calvo*, § 737; *Fiore*, § 418; *Pineau*, p. 122; *Sacopoulos*, p. 167; *Haladjian*, p. 67.

juristic persons which are formed without any express authorization; and that is a large and increasing class. It includes nearly all commercial associations, because they have in most countries been released from the necessity of obtaining official authorization, and can now establish themselves by a simple process of registration. For juristic persons of the latter class, it is said, some other test of nationality must be found. The state in which they came into existence has not authorized or recognized them; it has done nothing in connection with their institution; it has merely tacitly assented to their creation, and can in no sense be said to have created them itself, or to have performed any other act from which it is possible to construe an intention on its part to endow them with its nationality.

For these reasons most European jurists confine the theory under discussion to juristic persons which have received express authorization. The American theory would be rendered more defensible by adopting a similar reservation. But even in the restricted form it is open to much criticism. It appears to be based upon several distinct ideas. (a) In the first place, it may be contended that from an express authorization by the state must be implied an intention on the part of the state that its nationality should be imparted to the authorized juristic person, and that this intention is conclusive. But the intention of a single state can never be conclusive when we are searching for a fundamental principle of private international law. Such an intention may either be express or implied. In the first case, however strongly it may be expressed, if it transgresses against the rights of other states, it will be disregarded by their courts. An American court would, doubtless, hesitate to give effect to an act of the English Parliament which declared the municipality of Chicago an English corporation, and subject to the Municipal Corporations Act.¹ In the second case, if it is an implied intention, we must in addition seek some principle which will enable us to distinguish between those circumstances under which it must be implied and those under which it must not. In either case we are referred to

¹ It has been expressly decided by the Supreme Court of Kansas that the power of a state (Pennsylvania) to authorize corporations can only be exercised, so as to be valid in other states, within certain limits. "No rule of comity will allow one state to spawn corporations and send them forth into other states to be nurtured and do business there, when said first mentioned state will not allow them to do business within its own boundaries." *Land Grant Ry. Co. v. Coffee County*, 6 Kan. 245. Cf. also *Von Bar*, p. 228; *Diena*, p. 258.

some basis for our argument more fundamental than the matter of intention; and intention disappears from the scene as the final test of nationality.

It is not clear, moreover, why any such intention should be implied in an act of authorization. There are indeed many cases in which states have expressly authorized juristic persons in which it is impossible to imply it. Thus, according to the laws of certain countries, a *foreign* commercial association must obtain an express authorization before it can carry on business within that country's territories.¹ Authorization under such circumstances is clearly not intended to domesticate the foreign associations on which it is conferred. It does not affect their nationality: and it is difficult to see why an authorization which takes place at the formation of a juristic person should have any different effect from one which takes place at a later period in its history.²

(b) But the substantial basis of this theory seems to be different in nature from the preceding. As a matter of fact, since the institution of the system of registration for commercial associations, the necessity for an express authorization has been confined in general to juristic persons which are intended to discharge some function of a public nature, such as education, charity, or religion. Now, the control of such functions, it is said, falls within the acknowledged sphere of the state's activities, and they can be discharged by juristic persons by means only of a delegation of authority from the state. In performing them a juristic person acts as the arm of the state, and as a member of the state it must necessarily share the state's nationality, and be subject to the law of the state as its personal law.³ It will be seen that according to this argument the nationality of a corporation is made to depend ultimately upon the nature of its functions, and only incidentally upon the authorization which accompanied its formation. There is no necessary connection between an intention to exercise public functions and the receipt of an authorization. Some states, for instance, are willing to permit the foundation of associations, for the purpose of discharging public functions, by mere registration.⁴

¹ Russia, Imp. Decree of November 9, 1887; Turkey, Edict of November 25, 1887. Austria, Ordinance of November 29, 1865; Roumania, Commercial Code, § 244.

² See Arminjon, p. 387.

³ Brocher, § 26; Fiore, § 305.

⁴ "Any seven or more persons associated for any lawful purpose may . . . form an incorporated company." English Companies Act, 1862, § 6.

In such cases this argument in favor of express authorization as the test of nationality must be converted into an argument in favor of the nature of the juristic person's functions as such test. Such is its true nature in every case; and the theory would be more accurately expressed by saying that a juristic person which discharges public functions is domestic in the state in which those functions are discharged. In this form the theory cannot be satisfactorily examined until some consideration has been given to the subject of the domicile of a juristic person; and it will be referred to again in that connection. However, one inherent defect in it may be pointed out here. In making the nationality and the personal law of a juristic person depend upon the functions which it performs, it makes them depend on its political circumstances, and not upon its legal character or conditions. The nature of the authorization which it has received from the state, the part which it plays in the organization of the state, and the extent to which it has received a delegation of the state's authority,—these, as regards its legal life, are accidental and unimportant circumstances. They have little or no relation to, or effect upon, either the nature of its legal constitution or the extent of its legal capacities. Nationality in the present sense, as the factor which determines by what rules of law its legal constitution and capacities must be governed, is a juridical and not a political quality, and should therefore be determined by the legal and not by the political characteristics of the juristic person.

III. *A juristic person is domestic in the state in which the acts (or some one of them) by which it came into existence were performed.*

This is a theory which recommends itself at first sight, but it has nevertheless, on full consideration, been generally rejected. According to it, every *fondation* would be domestic in the state in which it was founded, every corporation in the state in which it was incorporated, and every commercial association in the state in which it was formed and registered. The simplicity of the proposition has recommended it to business men; and it was adopted by the Congress of Joint Stock Companies held in Paris in 1889.¹ But there are serious objections to it, both from the practical and from the theoretical point of view. It makes the nationality of a juristic person depend entirely upon the arbitrary will of its

¹ Clunet, 1890, p. 179. (The similar congress that met in Paris in 1900 took, however, as will be seen, a different view.) Cf. also Code adopted by International Law Association at their Berlin conference in 1906.

founders: they can give to it any nationality they please, regardless of its circumstances, by performing the acts which bring it into existence within the jurisdiction of the appropriate state and according to the formalities of its laws; and no subsequent event can afterwards deprive it of that nationality, or endow it with another, either in the eyes of its native state or in those of any other. Such a state of affairs would clearly put great temptation in the way of intending founders to flock to the state whose regulations for the establishment of juristic persons were the easiest and the cheapest, although the juristic persons they intended to found had no substantial connection with that state or with its subjects or territories. It would in consequence become impossible for any state to maintain regulations for the establishment of juristic persons more onerous than those of the state whose regulations were the most lenient; and small states, in order to secure the custom of founders, would be tempted to enter into a competition in leniency. This consideration alone has led to a very general consensus of opinion against the theory,¹ or any other theory that makes the nationality of a juristic person depend upon the arbitrary will of its founders or members rather than upon its legal character and circumstances.²

But there is a further objection to it in that it is not impossible that, of the various acts by which a juristic person is brought into existence, some may be performed in one state and some in another. The process of organizing a commercial association, for instance, includes several acts in the law. There is a contract between the future members, a subscription of capital, and the performance of whatever public formalities, such as registration, may be demanded by the law. Each of these might be made in a different country; and the theory would not then tell us in which of those countries the association was domestic.

In order to overcome the difficulty opinions have been expressed in favor of each of the three parts of the process of formation as the test of nationality and the personal law.

¹ See Weiss, Vol. II. p. 415; Lyon-Caen et Renault, Vol. II. p. 823; Surville et Arthuys, § 456; Pic, Clunet, 1892, p. 585; Thaller, *Annales de Dr. Comm.*, 1890, Vol. II. p. 259; Fiore, § 417; Diena, p. 260; Mamelok, p. 218; also Trib. Seine, 11 Mars, 1880; Trib. Gand, October 20, 1883; *Pasicrasie Belge*, 1884, II. 64; Cor. Cass, Roma in Clunet, 1889, p. 511, and 1890, p. 162; and Belgian Law of May 18, 1873, § 129.

² See Weiss, Vol. II. p. 418; Lyon-Caen et Renault, Vol. II. p. 822; Vavasseur, p. 345; Lyon-Caen, *Journal des Sociétés*, 1880, p. 36.

(a) A commercial association or other juristic person whose constitution is based on a contract between its members is domestic in the country in which the contract of association was made.

It must be implied, it is said, that the parties to the contract intended that their contract and its incidents should be governed by the *lex loci contractus*: and this intention, as an implied term of the contract of association by which the constitution and capacities of the juristic persons are regulated, is conclusive that that law must be applied to questions concerning its constitution and capacities, — that it is, in other words, its personal law.¹ But if, as we have seen, the intention of a state cannot be considered as conclusive of the nationality of a juristic person when it is expressed without regard to the circumstances of the juristic person and the rights of other states, still less can the intentions of private persons be so considered. Such an intention on the part of the founders, if it could be legitimately implied, might no doubt be binding on themselves as parties to the contract of association; it could not bind third parties, strangers to that contract, and still less could it bind states which considered that the intended attribution of nationality inflicted an injury upon their own rights or upon those of their subjects. There does not, however, appear to be any good reason why any such intention on the part of the founders should be implied. It seems equally reasonable to suppose that they intended that the personal law of the juristic person should be their own personal law, or that of the majority of them, with which, when the contract of association is concluded abroad, they are presumably better acquainted than they are with the *lex loci contractus*. Again, in the now frequent cases in which juristic persons are formed in one country for the purpose of performing all their functions in others, it would be more natural to imply that the founders intended that the juristic person should be governed by the laws of the country in which the center of its administration and the scene of its operation were to be situated, and with which, as prudent men, they would probably have made themselves acquainted. In view of such doubts as these, there seems to be little justification for the proposed rule either in theory or in practice.

(b) A commercial association is domestic in the state in which its capital was subscribed.

¹ See Brunard, Congress Soc. par Act, 1889, Comp. Rend. p. 213; and Arminjon, pp. 385, 388, who, however, rejects this reasoning.

This theory has received considerable support from authors on the subject, but it has never been judicially accepted or practically applied. Its principal advocate has been M. Thaller;¹ but practical objections to the theory in the general form in which he proposed it have led to the suggestion by certain authors, who accepted the substance of his theory, of other formulæ, the same in principle, but modified in detail. Shares in a joint stock commercial association are frequently issued, and its capital subscribed, in several states. To meet this difficulty M. Thaller can only suggest that such an association must be considered to be domestic in every state in which an appreciable part of its capital is subscribed, and that its founders must register it in every such state, and that the proportion of the capital which is sufficient thus to domesticate the association is a question of fact for the courts. The practical difficulties of such a state of affairs are apparent. An association must have one responsible center for its administrative business, and one only. With more than one it would be as unfitted for practical existence as would a body with several heads. Further, to refer to the decision of the courts upon a question of fact as the final test of nationality must always introduce a danger of conflicting decisions, which would saddle some associations with several nationalities whilst they left others without any.

To obviate such difficulties as these; it has been suggested that preference should be given to the state in which the shares of the association are first issued, and its original capital subscribed; or that preference should be given to the state in which the greater part of the total capital has been subscribed. These formulæ are, no doubt, more practical than that of M. Thaller, but their application would not be entirely free from similar difficulties. And there are other practical objections to the theory in any form. It applies only to associations which possess a capital, and it leaves us to find another and a different theory to apply to other juristic persons, which differ from the former class in their economical characteristics only, and not in any legal characteristic. It does not even provide a test applicable to all commercial associations, for in some countries such associations can be formed without any capital at all.

• So much as to the practical objections; it remains to discuss the theoretical arguments by which it is supported. These are based

¹ *Annales de Dr. Comm.*, 1890, part 2, p. 266; *cf.* *Surville et Arthuys*, § 456.

in the first place, on the intentions of the subscribers to commercial association; and, in the second place, on the intentions of states in legislating for their establishment. As to the first, it is unnecessary to repeat what has already been said as to the effect which can be allowed to the intentions of the founders or members of a juristic person in determining its nationality. As to the second, this argument from the intention of the state is entitled to more weight. The laws of a state, it is said, relating to commercial associations with capital, are enacted by it to protect the savings of its subjects from the designs of fraudulent promoters. Having been made with this intention, they must be applied to all associations which seek for capital from the subjects of that state. Such associations must be governed by that law as their personal law, and be domestic in that state.¹

Now, even if a state did intend that its whole law of commercial associations should apply to all commercial associations which obtained their capital within its jurisdiction, and actually expressed that intention, we should still have to ask, Does that intention transgress against the rights of other states? and so we should find ourselves referred to some more fundamental principle. But no such intention ever has been expressed by any state, and the supposed intention is therefore an implied intention if it exists at all. It is difficult, however, to see what grounds there can be for implying it. The whole legislation of a state relating to commercial associations is not enacted by it for the protection of its subjects' savings. One part is, no doubt, enacted with that intention, but a second part is enacted for the regulation of the constitution and capacities of the juristic person and the rights of the members *inter se*, and a third part is enacted to protect the interests of third parties, subjects of the state, with which the association may subsequently have dealings. It is the first part only that the state can reasonably be supposed to intend to apply to associations which apply for capital to its subjects; and the inference cannot be extended to the second or the third parts. A state is undoubtedly entitled to make what regulations it pleases for the subscription, within its jurisdiction, of capital to commercial associations. Such regulations relate to "public order," or "the rights of third parties, subjects of the state," since intending subscribers are still strangers to the association. They are therefore, on general principles, essentially matters

¹ Thaller, *supra*.

for the local law, and not for the personal law at all. A commercial association must, no doubt, if it desires to obtain capital within the jurisdiction of a state, observe the laws which that state has made to govern such subscriptions; and on the principle that *locus regit actum*, a subscription made in accordance with those laws must be recognized in every other state as properly made. But it would be unreasonable to assume that the state in question intended that the fact of the subscription should subject the association to all sorts of rules of law which were enacted in respect of matters which have nothing to do with the subscription, and should fix it with them forever as its personal law. If it did so intend, it would be passing beyond the true province of its legislative activity, and its intention might be disregarded by other states.

(c) A juristic person is domestic in the state in which the public formalities attendant upon its constitution were performed.

Many states have released certain juristic persons, especially commercial associations, from the necessity of obtaining an express authorization; but they continue nevertheless to exact from them the performance of certain formalities at the time of their formation, of which that of registration may be taken as typical. It is often said, and still more often assumed, that a juristic person is domestic in the state in which it was first registered; and the proposition appeals by its simplicity. If it be examined, it will be found to be open to the same objections as (a) and (b), above. It is supported by reference to the intention of the parties, — an argument which, as we have seen, is of questionable value. But its chief support has perhaps been derived from the idea that official registration implies some sort of creation, or express authorization or recognition, on the part of the state. If this idea is sound, the theory is but a form of the theory first dealt with, and it is open to the same objections. But it may be contended with force that it is unsound. Registration and other such public formalities are required by the state in order to secure publicity concerning the affairs of the juristic person, in the interests of third parties. The juristic person performs them, while the state remains a passive spectator, neither approving nor disapproving; indeed, one of the motives which led states to abandon the system of express authorization was the desire to avoid the appearance of giving official sanction to undertakings concerning which there could be no official knowledge.

In so far as the theory may be supported by reference to the

intention of the state, that may be said of it, *mutatis mutandis*, which has already been said of other theories supported by the same argument. The state, no doubt, intends that its laws, which regulate the public formalities necessary for the formation of a juristic person, should be observed by every juristic person which is formed within its jurisdiction. They are laws relating to public order, or the interests of third parties, subjects of the state, and must be observed by every juristic person to which they are intended to apply, as part of the local law. They are within the proper sphere of the legislative activities of the state, and when the juristic person in question has observed them, it must be acknowledged by every other state to have been properly constituted as regards the performance of public formalities attendant on its constitution. But no inference can be drawn that, because the state intended to apply this part of its law to a juristic person, it also intended to apply to it the whole of its law relating to juristic persons, and that that law is the personal law of the juristic person. Nor can an inference be drawn that the state intended that the part of its law regulating the public formalities in question should apply to any juristic persons other than those that were formed within its jurisdiction.

IV. *A juristic person is domestic in the state in which it is domiciled.*

It must be made clear that by the domicile of a juristic person is here meant its permanent home, the situation of which is a natural fact, depending on its constitution and circumstances; and that the word is not intended to imply any inference of law. It has indeed been contended that a juristic person is incapable of possessing a domicile in this sense. A fictitious person, it is said, can have no real home; and if one be attributed to it, it is by fiction of law only.¹ But it is common to find that those who advance this opinion admit, at the same time, not only that a domicile must be attributed to it, but that its location depends on the natural circumstances of the juristic person, — that it must be determined for some juristic persons, such as hospitals, municipalities, etc., by an obvious connection between the juristic person and the territory, and in others by the charter, or, in the absence of any provision in the

¹ *Merrick v. Brainard*, 34 N. Y. 208; *Insurance Co. v. Francis*, 11 Wall. (U. S.) 216. The contention is implied in the dictum of Taney, C. J., so often repeated in subsequent decisions, that "a corporation must dwell in the place of its creation and cannot migrate to another sovereignty." *Bank of Augusta v. Earle*, *supra*. Cf. also Wharton, *Conflict of Laws*, § 105 and § 48 (a).

charter, by the central point of the enterprise.¹ We have, then, a fiction which it is necessary to feign, and which is an expression of natural facts. Would it not be simpler and more scientific to say at once that the domicile of a juristic person is no fiction, no artificial attribution of law, but real in the same sense that the domicile of a natural person is real? The force of circumstances constantly compels us to consider a juristic person as resident at some particular place. It is natural and necessary that those who enter into legal relations with it should contemplate it as personally present at the center or centers from which it discharges its functions. An example of this tendency may be found in the manner in which the theory, once prevalent amongst lawyers in the United States, and recorded in many decisions, that a corporation can reside in the territories of that state only which "created" it, has given way, in connection with questions of jurisdiction, before the growing conviction that a corporation does, in a literal and unmetaphorical sense, reside wherever it has an agency or branch office, so that "a manufacturing company which maintains an established location here, and an agent, . . . has a business domicile here," wherever it may have been "created."² It is in fact now generally admitted that, in the words of Von Bar, "domicile is an attribute of juristic persons as well as of natural persons; in their case, too, we can conceive of a center of the activity which belongs to them as juristic persons."³

According to the theory stated above, it is the locality of its domicile that fixes the nationality of a juristic person.⁴ By reason of its legal characteristics, the quality of domicile does indeed seem to afford a test of nationality which is both practically convenient and theoretically sound. The personal law of natural persons depends in different legal systems upon *jus sanguinis*, *jus soli*, or domicile. Juristic persons can have no *jus sanguinis* or *jus soli*, but they can have *domicile*; and to refer their nationality to the latter circumstance preserves as much uniformity as possible between the law of natural persons and that of juristic persons. Domicile

¹ Cf. Dicey, *Conflict of Laws*, rule 19, pp. 154 *et seq.*; and Foote, *Private International Jurisprudence*, 3 ed., 176; following 4 Phillimore, *Internatl. Law*, 2 ed., 142, and Savigny, *Conflict of Laws* (translated Guthrie), § 357.

² *Southern Cotton Oil Co. v. Wimple*, 44 Fed. 27.

³ Von Bar, § 47. See also Calvo, *Dictionnaire de Dr. Int.*, Vol. I. tit. *Domicile Social*; Fiore, § 918; Vavasseur, p. 348.

⁴ Cf. Lyon-Coen et Renault, Vol. II. p. 823; Brocher, p. 101; Chervet, p. 128; also Cod. Comm. of Italy, art. 230; of Portugal, art. 109-111; of Roumania, art. 239; also Loi Belge, May 18, 1873, art. 128; and Nevada, Act 44 of 1889.

is not like authorization, or the place of performance of any of the acts by which the juristic person was constituted, an accidental circumstance having only a temporary effect on its history. It is a permanent attribute of its legal personality, with an immediate effect on its legal character and relations. It is, moreover, a matter of fact which is independent of the arbitrary will of its founders or members. If we are to consider their intentions as to the nationality of the juristic person, it seems to be at least as reasonable as any other assumption, to assume that they intended it to be domestic in the state in which it was to have its permanent home, and that its constitution and capacities, and their legal relations *inter se* as members, should be governed by the laws of that state. As to the intention of the state, it seems to be by far the most reasonable assumption that it is its intention that that part of its law which governs the constitution and capacities of juristic persons and the relations of their members *inter se*, and that part only, should of necessity be applied to those juristic persons, and those only, which have their permanent home within its jurisdiction, and which thus operate under its protection and enjoy the advantages which it provides. They alone have any permanent connection with it, and constantly renew their legal relations with its subjects and under its authority. And it is the rules of law, that constitute the part in question of the law of a state relating to juristic persons, that are the personal law of a juristic person to which they apply, and follow it from state to state.

The opinion is accordingly now widely accepted that the true test of the nationality of a juristic person is, not its place of origin, nor any other matter but its domicile, which is the permanent center of its affairs. It is perhaps in the United States alone that the theory has found no favor. Whilst it is recognized that a corporation, like a natural person, can have residences and so called "business domiciles," and that they will have the same effect upon its legal life, in such matters as jurisdiction and taxation, as they have upon that of a natural person, the further step has never been taken of recognizing that the principal residence, or permanent home, which is the domicile, may also have the same effect upon the legal life both of a natural and of a juristic person, and that, as it determines the personal law of the one, so it may determine that of the other also. Domicile is here disregarded for the sake of a strict adherence to the principle, deduced *a priori* from the theory that juristic personality is pure fiction, that a juristic person

is domestic in the country by the law of which its fictitious personality was "created." Thus the transfer of its principal office, or of most or even all of its business, from one state to another, has often been held to leave it still a foreign corporation in the latter state;¹ nor does it thereby become a citizen of the latter state for the purposes of federal jurisdiction.² Nothing can be more admirable than the loyalty with which such decisions have maintained the authority of *Bank of Augusta v. Earle*, and the ingenuity which has been displayed in establishing a *modus vivendi* between time-honored *dicta* and the fresh legal needs of modern corporations. One who approaches the theories current in the United States from the point of view of a foreign legal system must be diffident of his power rightly to appreciate them, and still more of his capacity to criticise them. But he may perhaps venture to guess that it must often have occurred to American lawyers that the time has come in the United States for a more liberal régime in this matter, and for one more in harmony with things as they are than that established in 1839.

There is an agreement on the part of recent authors on this subject, with some exceptions which have been noted, in favor of domicile as the true test of a juristic person's nationality. There is not the same agreement as to the true situation of the domicile. Various opinions have been expressed about this, which will now be briefly considered.

(a) *The domicile of a juristic person is at the place at which it discharges its functions.*

At first sight it is not unnatural to hold that the principal manifestation of the personality of a juristic person is at the scene of its operations, where its functions are discharged and its legal relations with third parties contracted. The theory has met with support both judicial³ and from authors on the subject.⁴

¹ *Merrick v. Brainard*, *supra*; *New Hampshire Land Co. v. Tilton*, 19 Fed. 73; *Hanna v. International Petroleum Co.*, 123 Oh. St. 622; *Newbury Petroleum Co. v. Weare*, 27 Oh. St. 343.

² *Insurance Co. v. Francis*, *supra*; *Pacific Railway Co. v. Missouri Pacific Railway Co.*, 23 Fed. 565; *Booth v. St. Louis Fire Engine Mfg. Co.*, 40 Fed. 1; *Chicago and Northwestern R. R. Co. v. Chicago and Pacific R. R. Co.* (1874), 6 Biss. (U. S.) 219; *Railroad Co. v. Whitton*, 13 Wall. (U. S.) 270.

³ Trib. Leipzig (reported Clunet, 1874, p. 82); Cour Cass. (reported Sirrey, 1863, I. p. 199).

⁴ Lyon-Caen, *Journal des Soc.*, 1880, p. 36; Despagnet, § 64; Lyon-Caen et Renault, Vol. II. p. 823; Asser et Rivier, p. 197; Weiss, Vol. II. p. 147; also Rolin,

There are, however, strong practical objections to it. They may be briefly indicated by asking the questions, What would be the nationality of a mining company founded in New York to exploit mines in Persia or Patagonia, and if it is Persian or Patagonian, as this theory would teach, where is it to discover the laws by which it must regulate its existence? What, again, is the nationality of a railway company which works a line passing through several states, or of the *Compagnie Internationale des Wagon Lits*? What is the nationality of a corporation that has no plant, such as a banking or insurance corporation, but does business by correspondence in many states, the amount of which in each state may fluctuate from day to day?¹ The advocates of the theory can only suggest that in such doubtful cases it is for the courts to decide which is the principal scene of operations.² To throw such a burden upon the courts without providing them with any adequate principles upon which to base their decision is, as it has been said, to incur the danger of conflicting decisions doubling one juristic person's nationality and depriving another of any.

(b) *The domicile of a juristic person is at that place at which it is fixed by its charter or other constitutive documents as its seat.*

The opinion has been maintained, especially by German jurists, that the domicile of a juristic person may be fixed once and for all by its constitutive documents, and that the place therein named remains its domicile, wherever its scene of operations or its center of administrative business may afterwards come to be.³

Domicile is thus reduced to a pure fiction, and nationality and personal law are determined by an arbitrary choice, and not by the legal characteristics of the juristic person. For these reasons the opinion can scarcely be accepted as satisfactory.⁴ Why should a juristic person be permitted to select its nationality in this manner,

Vol. III. No. 1277. Cf. also Resolution of Congress of Joint Stock Companies at Paris, 1900: "The nationality of a Joint Stock Company should be determined by the country in which it has its principal establishment *or* by the country of its true seat (*siège réel*), fixed by its statutes."

¹ Cf. Surville et Arthuys, § 456; Pic, *loc. cit.*; Mamelok, p. 222; Pineau, p. 133.

² Lyon-Caen et Renault; Vol. II. p. 824.

³ Savigny, Conflict of Laws (translated Guthrie), § 354; Staub, Kommentar zu allgemeine deutsches H. G. B. (1896), pp. 373, 414; Ring, Das Reichsgesetz bet. die Kommanditges. auf Aktien, Vol. II. p. 185; also Rattigan, *op. cit.*, p. 45, "as a rule, the question [of domicile] is found to be settled by the charter of their constitution or by special legislative enactment."

⁴ Cf. Vavasseur, p. 345; Mamelok, p. 225; Lehman, Archiv für bürg. Recht, Vol. IX. 356; Holdhein, Motive zum deutsches B. G. B., Vol. I. 77.

or indeed in any other manner, while a natural person is not permitted to do so? In the one case, as in the other, it should be recognized that nationality is a natural characteristic, and can be affected neither by agreement nor by an expression of wishes or intentions. A decision of the Swiss Bundesgericht has well defined the true effect upon its domicile of special provisions in the constitutive documents of a juristic person. "The statutes of a joint stock company," it was said, "are of course decisive in the first place as to the position of its seat. Special circumstances must be shewn in order to establish that the provision of the statutes as to the seat of the joint stock company are inconsistent with actual fact, a pure fiction resting its legal relation on an evasion of the law as to their true center."¹ The special provision is *prima facie* proof; but if it appears that in fact the domicile of the juristic person is at some other place than that at which it is fixed by the special provision, the fact overrules the presumption.

(c) *The domicile of a juristic person is at the place at which the center of its administrative business is situated.*

The place at which a juristic person discharges its functions is the center of its economic activities only. The true center of its legal activities is the place at which its administrative business is conducted. It is there that its personality manifests itself, for it is there that its organs operate, directing its operations and controlling its policy. The real elements in its personality have their real location there, for it is there that its will, which exists independently of the wills of its members, is expressed by resolution of its governing bodies or of the general assembly of its members. The center of its administrative business is thus no accidental or irrelevant feature in its legal character and circumstances. It is the place at which all its legal relations, internal or external, are concentrated, and thus it forms an appropriate test of the quality of nationality, which, as it has been said, should be intrinsic in its character, and inherent in its relation with others.

The fact that a juristic person thus lives its legal life at a place makes an obvious connection between it and the laws of the country in which that place is situated; and it is natural to suppose that the

¹ *In re* The Liquidation of the Société Laitière de l'Est, Judgment of July 22, 1889. A. S., XV., N. 79. Cf. also Von Bar, § 47; and, *contra*, the opinion expressed by the Institute of International Law at Hamburg, 1891: "It is necessary to give preference to the domicile, — to the seat indicated by the statutes."

state in enacting those laws intended that, in so far as they relate to the internal regulation of a juristic person, to its constitution, and to the legal relations of its members with each other and with the juristic person itself, they should apply to those juristic persons, and those only, whose internal affairs are conducted, whose personality expresses itself, and whose constitution functions, within the territories to which the laws apply; and whose legal relations towards its members, and those of its members towards each other, are there regulated and controlled.

That the center of administrative business is the true domicile or permanent home of a juristic person, and is the test, in consequence, of its personal law, is, for these reasons, now the most favored opinion.¹ The theory has the advantage of being clear, comprehensive, and readily applicable in practice. In the great majority of cases the determination of the situation of a juristic person's center of administrative business must be a very simple question of fact; other cases in which the organs of the juristic person are distributed or concealed may present more difficulty, but the difficulty is in the determination of the facts, not in the application of the theory.

Certain modifications in the principle have been proposed in order to diminish such freedom of choice as it allows to juristic persons as to their nationality, and to prevent fraudulent evasion by its subjects of a state's law of juristic persons. The suggestions made for this purpose have taken the form of proposed limitations as to the situation in which the center of administrative business may be placed. Nationality, it is said, is determined by the center of administrative business, but that center must be in such and such a place. Thus it is very commonly argued that it is necessary to limit freedom of choice according to the formula that a juristic per-

¹ Surville et Arthuys, § 456; Arminjon, pp. 396, 407; Pic, *loc. cit.*; Vavasseur, p. 349; Lefèvre Clunet, 1882, p. 403; Deloison, *Traité des Soc. Comm.*, I., No. 164; Duvivier, *Faillite des Soc.*, p. 259; Sacopoulo, pp. 173-175; Chervet, p. 130; also decisions of French Tribunals, reported Clunet, 1896, p. 138; 1897, p. 364; 1898, p. 341; and Dallon 70, I. 416.

Von Bar, §§ 47, 104; Mamelok, p. 101. Cf. also German Code of Civil Procedure § 19: "Unless some other seat is plainly discoverable, the place where the management of the business is carried on is held to be the seat."

Cf. also Indian Code Civil Procedure, 1882, Art. XIV. § 17, explanation (2). The Institute of International Law in 1891 adopted the following resolution: "(5) The country of origin of a joint stock company must be considered to be the country in which the legal center of its administrative business is situated in good faith."

son is domestic in the country in which the center of its administrative business is situated "in good faith" or "without fraud."¹

The word "fraud" in this connection is capable of two meanings. Construed in one way, it expresses a valid limitation, but one so obvious that it would seem unnecessary to make express mention of it. Construed in the other, it amounts to the statement of a theory, like in kind to some which have already been considered, and open to the same objections. It may mean a mere fraudulent simulation of a center of business in a place other than the true center; and then its effect is only to call attention to a matter which scarcely needs so much emphasis, that the situation of the center of a juristic person's administrative business is a question of fact; that that place which is in fact its true center is its domicile, and that if it pretends to have its center at some other place than that at which it is in fact, the pretended center is to be disregarded, as a test of nationality, in favor of its true center. But it is clear that this is not the meaning which the word is commonly intended to bear. By fraud in this connection is meant, not the simulation of a false centre of administrative business, but a fraud practised upon the law, in fixing the situation of the true center, — a fraud which consists in fixing that true center in some country in which it ought not to be. Thus it has been frequently held by French and German courts that a juristic person cannot be recognized to be foreign which fixes its center of administrative business abroad for the sole purpose of evading the provisions of the law of the country in which that center ought to have been fixed.²

In the United States the same doctrine has been applied to the accepted theory that a corporation is domestic in the country by the laws of which it was "created." It has, for instance, been held that for the citizens of one state to organize a corporation under the laws of another, for the purpose of transacting all its business in the former, is a fraud upon the laws of the former, and that the corporation in consequence possesses no status as a person within its territories.³

It is clear that where this meaning is given to the word, some

¹ Cf. Resolution of Institute of International Law, 1891, quoted *supra*; also Cour Cass., reported Clunet, 1897, p. 364; Trib. Comm. Seine, reported Clunet, 1904, p. 189; and Trib. Brussels, reported Clunet, 1885, p. 292; also Pillet, p. 201.

² See *c. g.* cases in preceding note.

³ Hull v. Beach, 12 N. J. Eq. 31; Booth v. Wordery, 36 N. J. L. 250. *Contra*, Demarest v. Flack, 128 N. Y. 205.

other test than that of domicile is being introduced as the true and ultimate test of nationality. It is assumed that, while the domicile fixed by a juristic person in a certain country may be the actual center of its administrative business, yet it is to be disregarded in determining the juristic person's nationality if it is not in the country in which it ought to be. The introduction of the idea that there is an obligation to fix the center of administrative business in some country, and that not to fix it there is a fraud, shows that not the country in which the domicile is, but that other country in which it ought to be, is in reality being assumed as the country in which the juristic person is domestic. The introduction of some such further test of nationality is necessary to give any meaning to the word "fraud." One cannot commit a fraud upon a law which is not binding upon him. But if the center of administrative business is the simple and sufficient test of nationality, then the law of juristic persons of any state binds those juristic persons only which have their center of administrative business within its territories. It does not bind those which fix their center of administrative business elsewhere, and if it does not bind them, it is no fraud for them to disregard it.¹ Under the circumstances it is an inherent defect of the use of the word "fraud," that it does not tell us in what country the center of administrative business ought to be placed. To say that it must be placed somewhere "in good faith," refers us to some standard as to what is, and what is not, fraudulent, but gives us no clue as to what the standard is. Is it fraudulent to place the center of administrative business elsewhere than in the country in which the juristic person was authorized? or in which the majority of its members reside, or the greater part of its capital is owned? or in which one or all of the acts necessary for its constitution were performed? or in which the scene of its operations is situated? If we accept one or other of these circumstances as the standard of fraud, it is clear that we are in substance abandoning the center of administrative business as a test of nationality in favor of another test, and thus incurring all those difficulties which have been seen to attend the adoption of any of those other tests. Perhaps the use of the word "fraud" is most commonly intended to imply that all such circumstances are to be weighed in considering whether a juristic person has fixed its centre of administrative business in good faith or not, so that the issue of fraud or no fraud depends upon a

¹ Cf. Mamelok, p. 229; Arminjon, p. 408; Diena, p. 260; Demarest v. Flack, *supra*.

comprehensive view of all the circumstances of the juristic person. If this is so, then center of administrative business is being rejected as a test of nationality in favor of an eclectic system, which makes nationality depend on the resultant of all those circumstances, the claims of which to be the sole test have already been considered one by one. This principle, that the nationality of a juristic person is what is called a simple question of fact, dependent upon its circumstances, has been sometimes advocated independently,¹ apart from its implication in the limitation against fraud usually added to theories in favor of the center of administrative business as the sole test of nationality. It may be said of it, that in attempting to combine all other proposed principles, it succeeds in combining their defects only. Nationality is not in any accurate sense a question of fact, it is a question for a legal inference to be made from facts, and what facts may give rise to the inference must be ascertained by some definite legal principle. The eclectic system provides no such principle. It negatives, indeed, the possibility of arriving at any definite conclusion to the discussion, and erects that negation into a principle. Referred to this standard, courts of law would be left without any definite guidance for their decisions. Different courts might consider that different circumstances were material to their decisions, or that the same circumstances were of different importance. Certainty and uniformity of decision would be imperilled, and there would be no guarantee against conflicting decisions.

For these reasons it seems that to introduce a qualification as to fraud in this sense into the theory, that a juristic person is domiciled at its center of administrative business, is in fact to qualify away the whole effect of the theory.² It should be recognized that a juristic person by fixing its seat in a country has, in that circumstance which is of the most relevance and importance, become domestic there; that it has not avoided the imposition of the law of any other country by a mere formality or trick, but that it was, in substance and in fact, never bound by that law, and that other countries are not entitled to disregard the substantial connection which it has formed with the country in which its center of administrative business is situated.

¹ Cf. Macquero, *Traité alphabétique des droits de l'enregistrement*; Rolin, *Droit International Privé* III., § 1278; Cour Cass. Dallon, 1870, I. 416; Surville et Arthuys, § 456; Vavasseur, p. 349, who inclines, however, to accept the center of administrative business as the sole test.

² Cf. Arminjon, pp. 408 *et seq.*

The principle that a juristic person is domestic in the state in which it is domiciled is commonly stated by continental jurists to be true only of those juristic persons which have received no express authorization or recognition from any state, a class which includes the great majority of commercial associations. It is, as has been seen, considered that juristic persons which have obtained express authorization — a class which is usually assumed to be, and which is in practice, identical with that of juristic persons which discharge public functions — are by that circumstance conclusively proved to be domestic in the territories of the state by which they were authorized. The division of juristic persons into two classes is natural for those who are primarily concerned with legal systems in which there is a sharp distinction in status between the private and the public juristic person. It is less natural for common lawyers, who are not accustomed to make the distinction. Nor does the distinction appear to be necessary in this connection. Something has already been said of the defects in the principle that authorization fixes nationality. It makes nationality depend on accidental and political circumstances, and not on the intrinsic legal character and circumstances of the juristic person. The fact that a juristic person discharges functions which are part of the proper activities of the state, and can therefore be discharged by it only by means of a delegation of authority from the state, shows no doubt that it is, from the political point of view, acting as part of the state's organization. But why should this be conclusive, from the juridical point of view, of its nationality? It is not so in the case of natural persons. A tax collector is not necessarily an Englishman because he collects taxes on behalf of the Inland Revenue; his occupation has no effect upon his nationality. So also the social functions of a juristic person are unconnected with and should have no effect upon its legal capacities and the question of its personal law. No doubt juristic persons exercising public functions will, with but few exceptions, have their center of administrative business within the territories of the state in connection with which they discharge those functions. The majority of them, such as public administrative bodies, municipalities, colleges, hospitals, and churches, are by nature fixed to one particular spot, both as the scene of their operations and as the center of their administrative business; nor is it easy to imagine circumstances in which a state is likely to grant express authorization to a juristic person whose center of

administrative business is fixed outside its territories. There is therefore little practical difference between the acceptance of the center of administrative business as the test of nationality in every case, and the acceptance of it as a test only when there has been an express authorization. But theoretically the former theory seems preferable. There is no such specific difference between juristic persons of different sorts as to prevent the center of administrative business from being the true test of the nationality of every sort, if it is so for any sort; and to accept it for some while rejecting it for others must be purely arbitrary. The principle, that a juristic person is domestic in the country in which its center of administrative business is situated, is based upon the idea that it is at that place that it manifests its personality; and that is true whatever may be the functions which it performs, and whether it is a commercial association, or a corporation with public functions, or a *fondation* or *Stiftung* without members, acting by a committee of management.

If a juristic person is domestic in the country in which its center of administrative business is situated, and has the law of that country for its personal law, then we know that its constitution, capacities, and manner of performing its functions, its relation to its members, the relations of the members to each other, and all other matters which on general principles are matters for the personal law, must be regulated by the law of juristic persons of that country. Combining this principle with the principle that, as regards the public formalities attendant upon its constitution and the issue of its capital, *locus regit actum*, we may say that we have a complete account of its position in private international law.

It is complete, at least, as far as regards juristic persons other than commercial associations. In their case there are certain practical difficulties which obscure the application of the principle. In passing laws for their regulation, states have had in mind only such associations as would both be formed and registered within their territories, and would also desire to establish their center of administrative business, and be permanently domiciled there. They have not contemplated the possibility that a juristic person might desire to perform the ceremonies incidental to constitution within their territories and, at the same or some later time, to establish its domicile in the territories of some other state. No pains have been taken to separate from each other the three parts of the law of juristic persons between which a distinction has been drawn above;

and it must, in consequence, be difficult in many states for a juristic person to subject itself to one of those parts, without *ipso facto* subjecting itself to the other two. The failure on the part of legislatures to appreciate that legal principles demand that a distinction should be made between the three parts necessarily places great practical difficulties in the way of a commercial association, which desires to place its center of administrative business in a state different from that in which it performed the formalities incidental to its constitution. If, in order to procure registration in state A, it had to adopt the constitution provided for by the laws of that state, it may subsequently be unable to establish itself as domestic in state B, since state B may require a different constitution in its domestic juristic persons. A peg cast in a square mould cannot be fitted to a round hole.

In conclusion, let us return for a moment to the American doctrine. Those who adhere strictly to the theory that the personality of a juristic person is pure fiction must maintain, as a consequence of that theory, that it is impossible for a juristic person to possess any nationality but that of the state by the law of which it was created. According to them a juristic person is a creature of law, and exists only in contemplation of the law which created it; and clearly the same juristic person cannot be contemplated by two laws at once. If it seeks to pass from the contemplation of one law to that of another, it must obtain some express authorization or recognition in the second state, which is in reality nothing less than a recreation. Domicile can have no effect upon its domesticity, for it can never be domestic in any state but that in which it first came into existence, either by express authorization or by mere registration. Some of the difficulties and deficiencies, theoretical and practical, inherent in this line of argument, have, it is hoped, been made clear in this article. The pith of the matter is that the actual character and practical circumstances of modern juristic persons tend to increase the importance of natural domicile amongst their legal characteristics, and to diminish that of the process by which they came into existence. Men tend more and more to see in juristic persons, not legal fictions, but real things; and if there is any reality in the nature of a juristic person, there can be no difficulty in admitting that the situation of its domicile can and should have the same effect upon its life in the law that it has upon that of a natural person.

E. Hilton Young.

Abbreviated References.

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| Weiss | Traité Théorique et Pratique de D. I. P. (1892). |
| Calvo | Le Droit International Théorique et Pratique (4th ed., 1888). |
| Fiore | Diritto Internazionale Privato, Vol. I. (3d ed.). |
| Pineau | Des Sociétés Commerciales en D. I. P. (1894). |
| Sacopoulos | Des Personnes Morales en D. I. P. (1898). |
| Haladjian | Des Personnes Morales Étrangers (1901). |
| Von Bar | The Theory and Practice of P. I. L. (translated Gillespie, 2d ed., 1892). |
| Diena | Trattato di Diritto Commerciale Internazionale, Vol. I. (1900). |
| Arminjon | Nationalité des Personnes Morales. <i>Révue de Dr. Internatl.</i> 1902. |
| Brocher | Droit International Privé (1876). |
| Clunet | Journal du D. I. P. et de la jurisprudence comparée, pub. par E. Clunet. |
| Lyon-Caen et Renault | Traité de Droit Commercial (2d ed., 1892). |
| Surville et Arthuys | Cours Élémentaire de D. I. P. (4th ed., 1904). |
| Mamelok | Die juristische Person im Internationalen Privatrecht (1900). |
| Vavasseur | Des Sociétés constituées à l'Étrangère, etc. Clunet, 1874. |
| Chervet | Des Sociétés Commerciales en D. I. P. (1886). |
| Despagne | Précis de D. I. P. (1886). |
| Asser et Rivier | Éléments de D. I. P. (1884). |
| Pillet | Principes de D. I. P. (1903). |

FEDERAL TAXATION OF INTERSTATE COMMERCE.

THE policy of Congress for the greater part of the life of the United States under their present Constitution has been to promote free trade between all parts of the United States. This has been mainly accomplished by refraining from legislation to regulate interstate commerce. Of late years it has been urged in high quarters that statutes should be enacted to bring under federal supervision the larger corporations, having a franchise from a state, which dispose of goods through such commerce. One mode suggested for accomplishing this result has been the requirement of a federal license. It is the purpose of this paper to suggest another, as not legally impossible, — taxation.

Congress has power to lay taxes, duties, imposts, and excises. The word "impost," as thus used, has been said by the Supreme Court of the United States not to cover imposts on importations from one state into another.¹ In the same opinion it was held that the clause² as to state laws for imposts or duties on imports and exports had no reference to interstate commerce. But should Congress lay such duties on exports from one state to another, would it necessarily be obnoxious to the provision in restriction of its powers that "no tax or duty shall be laid on articles exported from any state"?

A statute of such a character would most naturally take the shape of a tax on the business of shipping goods from one state to another for a market, when conducted by an artificial person of a certain character and attaining large proportions. It might, for instance, affect only private corporations so shipping goods of a value of \$1,000,000 a year, and having a capital stock of not less than \$5,000,000.

If Congress should be of opinion that artificial bodies of this kind, dealing in large values, and permitted to enjoy the privileges of a market as wide as the United States, with all the transportation facilities provided or kept in order under the national power to regulate commerce among the several states, were proper sources

¹ *Woodruff v. Parham*, 8 Wall (U. S.) 123, 132.

² Art. I. § 9.

from which to draw a revenue, is there anything in the Constitution of the United States to prevent legislation to that end? No doubt, such a tax on the shipper, for the privilege of shipment and sale, would in effect be a tax on exports from a state.¹ But if the reasoning in *Woodruff v. Parham* be sound, is there anything in the Constitution which in terms forbids a tax on exports from a state to another state, whether imposed by Congress or by a state?

The importance of this question seems to justify an examination of the grounds of the opinion in that famous case.

It contains an historical review of the use of the terms "exports" and "imports" prior to the adoption of the Constitution, concluding thus:²

"It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . . Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another."

Mr. Justice Nelson filed a vigorous dissenting opinion. The power of Congress to regulate commerce, he observed,³ extends both to that with foreign nations and between the states. "The two are placed upon the same footing without any discrimination. The power is equally broad and absolute over the one as over the other. No distinction is made between foreign and interstate commerce; and why should the specific prohibitions to be found in the Constitution in relation to this subject receive a different interpretation, in the absence of any words indicating any such distinction? Take, as an example, the prohibition upon the federal government: 'No tax or duty shall be laid on articles exported from any state.' Is this clause, also, to receive the narrow and strained construction given to the one in question, and be applied only to exports to a foreign country? If so, then Congress may tax all exports from one state to another. If the terms in the clause before us do not

¹ *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

³ *Ibid.* 144.

² 8 Wall. (U. S.) 136.

embrace interstate commerce, then the above clause does not. As was said by the Chief Justice in *Brown v. Maryland*, 'There is some diversity in the language, but none is perceivable in the act which is prohibited.' Now, this is a prohibition or limitation upon the general commercial power conferred upon Congress, but if it only applies to foreign commerce, it loses more than half its efficiency as heretofore supposed to belong to it."

Similar views as to these points have been since expressed by other members of the Supreme Court of the United States, in dissenting opinions,¹ but the doctrine of *Woodruff v. Parham* as to taxes by a state on exports and imports has notwithstanding been repeatedly reaffirmed.²

It is submitted that the historical basis on which it rests is insecure.

There can be no doubt that one of the immediate causes of the adoption of the national Constitution was the varying, conflicting, and discriminating legislation of the different states on the subject of trade not wholly domestic. It was the effect of this on the commerce of the Chesapeake which led to the Annapolis Convention, and that Convention led to the greater one at Philadelphia.³

Virginia, as early as October, 1782, had laid a duty on all ardent spirits, "which shall be imported or brought into this Commonwealth, either by land or water, from any port or place whatsoever."⁴ In the following May she took similar action as to all goods of certain kinds "which may be imported either by land or water into this state."⁵ There could, of course, be no importation by land, from a foreign country, for Virginia had no foreign neighbor.

Massachusetts, on March 22, 1783, provided for an "impost" to be paid "at the Time and Place of Importation" on all goods "of European and India Growth and manufacture — (on which no Duty or Excise is laid by any Act of this Commonwealth now in force), that shall be imported by land or water from any foreign Port, Island, or Plantation, or any other State whatever, into this State, and landed within the same."⁶

¹ The Lottery Case, 188 U. S. 321, 373.

² *Am. Steel & Wire Co. v. Speed*, 192 U. S. 500.

³ See *Cook v. Pennsylvania*, 97 U. S. 566, 574.

⁴ 11 Hennings Laws 121.

⁵ *Ibid.* 196.

⁶ Session Laws of 1783, State Reprint, 152.

A few months later (July 10, 1783), this was superseded by another and much more comprehensive act.¹

This laid "an impost" on all goods "that shall be brought into this Commonwealth by land or water (except hemp and salt and such articles as are the manufacture and growth of the United States of America) that shall be landed or unloaded within the same."

An exception was made in favor of "Rum manufactured within this Commonwealth," sold "to be exported by land into a neighboring State."²

The act was to be in force for three years only.

The next year this exception was repealed, but with a proviso in favor of goods imported "belonging to a subject of any other State in the Union, and designed to be exported whole and entire to such State by water only," but "no subject of any other State in the Union" was to be "entitled to the benefit of the foregoing provision, unless there be an Act laying duties of impost of equal amount within such State; nor until the legislature of such State shall have passed a law, equally beneficial to the subjects of this Commonwealth."³

The comparative ease of the burden which is laid on the people in general by taxes on imports was as well understood then as now. Each state was also bidding for foreign trade. There was legislation by Connecticut in the direction of exempting foreign imports from duties, while imposing them on those from other states. One of these statutes, entitled "An Act for Levying and collecting a Duty on certain Articles of Goods, Wares and Merchandize imported into this State, by Land or Water," concerned only goods "imported or brought into this State, by Land or Water, from any of the United States of America."⁴ This legislation bore hardly on Massachusetts, and the General Court of that state soon afterwards (on June 27, 1785) passed a Resolution entitled as "Requesting the Governor to procure the laws of other States, to publish an abstract of customs and duties, and to expostulate with other States respecting their Excise Acts," which contained the following provision:

"And it is further Resolved, That his Excellency be requested to expostulate with such of the United States, as have passed Impost and Excise

¹ Session Laws of 1783, State Reprint, 506.

² *Ibid.* 519.

³ Session Laws of 1784, State Reprint, 29.

⁴ Session Laws of May, 1784, 268, 270; and of October, 1784, 312.

Acts, or other Laws for the Regulation of Trade, that affect the commercial interest of the citizens of this State, and to urge the propriety of their making such alterations and amendments, as shall render them not only conformable to the spirit of the Constitution, but consistent with those principles of reciprocity which in a national view, ought ever to be adopted."

Governor Bowdoin accordingly wrote to the Governor of Connecticut, on July 27, 1785, a letter commencing thus:

"I have observed a law passed by the Legislature of Connecticut, whereby a duty is laid on goods imported into that State from any of the United States, while the same goods are exempted from a duty if imported into that State from a foreign country. This distinction, so manifestly giving a preference to foreigners in prejudice to the United States, it is to be feared, may be construed as indicating an abatement of that mutual affection and good humour which subsisted among them in the time of their calamity & distress; which was indispensibly necessary while they were jointly struggling against common injury, and which will be equally necessary while they continue, as they at present are, embarked in the same common interest and exposed to common danger. . . .

"But the Act above referred to not only injures in its operation the foreign commerce of this Commonwealth, but prevents its citizens from vending articles of their own manufacture to the citizens of Connecticut. This must be considered as the more exceptionable, inasmuch as for the sake of cementing the Union which is the true policy of the confederated Commonwealth, our laws exact no duties on the manufactures of any of the United States, and in regard to commerce their citizens respectively stand upon a footing with our own."¹

A copy of this communication and also of the legislative resolution was sent by Governor Bowdoin to every other state of the United States. The object of this action he explained more fully to Patrick Henry as Governor of Virginia in an official letter of October 18, 1785, of which the following is a part:

"One of the States had passed an Act laying duties on foreign goods imported from any of the United States, while the same goods imported immediately from foreign countries were not chargeable with such duties. By the same Act duties were also laid on rum, loaf sugar, and several other articles which are manufactured in this Commonwealth. A preference thus given to foreigners to the prejudice of the United States, or either of them, appeared very extraordinary. This Commonwealth felt itself affected, both as a member of the Confederacy and as an individual State charged with duties

¹ 6 Collections of the Mass. Hist. Soc., 7th Series, 62.

on its own manufactures, whereby its citizens would probably be prevented from vending them to the citizens of a sister State. The measure appeared the more grievous, because the laws of this Commonwealth require no duties on the manufactures of any of the United States, and their citizens respectively are in point of commerce on a footing here with our own. The Act aforementioned gave rise to the Resolution. Your Excy. will perceive it must particularly apply to that State. Accordingly an expostulatory letter was addressed to that State only. But as it must, in the opinion of every one, be a matter of the utmost importance to the United States that each of them should carefully avoid taking measures which might give just cause of offence to others & tend to the interruption of that harmony & mutual good will upon which the general safety & welfare depends, I took the liberty to inclose it to the several States; being fully perswaded that if any of them should think proper to revise their commercial laws, and should thereupon observe an instance of such a nature & tendency, it would be altered or repealed."¹

Undoubtedly this correspondence was before the Virginia Assembly when, in November, 1785, they voted to instruct their delegates in Congress to propose a recommendation to the states that they should authorize Congress to regulate their trade on certain principles, one of which was thus stated:

"That no State be at liberty to impose duties on any goods, wares or merchandise, imported, by land or by water, from any other State, but may altogether prohibit the importation from any State of any particular species or description of goods, wares or merchandise, of which the importation is at the same time prohibited from all other places whatsoever."²

On reconsideration, this vote gave place to the resolution under which (Jan. 21, 1786) the Annapolis Convention was called.³

It may be added that Massachusetts, pending the result of her Governor's expostulations, suspended, from time to time, the proviso of her impost statute above quoted in favor of subjects of other states of the United States.⁴

The last of these suspending resolutions (which were passed on July 4 and Dec. 1, 1785, and Feb. 28 and July 8, 1786), "in order to induce a free trade with the interior parts of our neighboring States," allowed an exemption from excise of all articles "transported out of the State by land" in bond.

¹ 6 Collections of the Mass. Hist. Soc., 7th Series, 76.

² 1 Elliot's Debates 114.

³ *Ibid.* 115.

⁴ Session Laws of 1785, State Reprint, 656, 698, 809, 859; *ibid.* of 1786, 67.

In 1786 (Nov. 18) all these acts were repealed by a new law, in which, among other things, boots and shoes, artificial flowers, playing cards, perfumery, children's toys, spelling books, novels, romances, and plays, coffin furniture, candles, butter, and all kinds of wearing apparel, "not being the growth or manufacture of any of the United States of America," were "declared to be contraband, and are prohibited from being brought into this State by land or water, on pain of forfeiture." Goods imported "belonging to a Citizen of any other State in the Union" and "transported whole and entire to such State" were exempted from any duty.¹

On March 14, 1788, an act was passed reciting that many bonds had been given "to secure the import of goods imported into this Commonwealth" by citizens of other states, which "were afterwards exported to those States where the owners lived," and ordering the cancellation of their obligations, on satisfactory proof that such goods were in fact "Exported out of this Commonwealth and not relanded therein."²

In the same month and year, Maryland, to protect the people and markets of the town of Baltimore, provided for the inspection of all salted beef or fish "brought or imported into the said town from any part of this State or any one of the United States, or from any foreign port whatever." The importer was to pay the inspection fee, and the professed object was to make it secure that the beef or fish was merchantable and sound.³

It is difficult to read statutes like those above described, and particularly such parts of them as have been quoted, without coming to the opinion that the terms "exports" and "imports" were deemed by the legislators of the day, if not otherwise qualified,⁴ as covering exports from and imports into the states of the Union, whether the trade were between the states or with foreign parts.

In the discussions in the Federal Convention of 1787, on the proposition that Congress should be forbidden to tax articles exported from any state, Mr. Langdon of New Hampshire observed that this left the states at liberty to tax exports, and that "New Hampshire therefore, with the other non-exporting States, will be subject to be taxed by the States exporting its produce."⁵

¹ Session Laws, State Reprint, 117.

² Session Laws of 1787, State Reprint, 839.

³ 2 Laws of Maryland, 1811 Ed., Maxcy's Revision, 4.

⁴ As was done in the Act of Congress of April 18, 1783. 8 Journal of Congress 186.

⁵ 5 Elliot's Debates 454.

Ellsworth replied that the power of Congress to regulate trade between the states would protect them against each other, but, if not, the attempts of one to tax the produce of another passing through its hands would "force a direct exportation and defeat themselves." Madison insisted that a grant to Congress of power to tax exports was necessary, because its power to regulate "trade between State and State cannot effect more than indirectly to hinder a State from taxing its own exports." This hindrance Congress could create by authorizing the citizens of any state "to carry their commodities freely into a neighboring State, which might decline taxing exports, in order to draw into its channel the trade of its neighbors. As to the fear of disproportionate burdens on the more exporting States, it might be remarked that it was agreed, on all hands, that the revenue would principally be drawn from trade, and as only a given revenue would be needed, it was not material whether all should be drawn wholly from imports, or half from those and half from exports. The imports and exports must be pretty nearly equal in every State, and, relatively, the same among the different States."¹

Later, when Mason argued that the states ought not to be prohibited in all cases from laying "imposts or duties on imports," since they might need to do so in order to encourage certain manufactures for which they had natural advantages, Madison replied that "the encouragement of manufactures in that mode requires duties, not only on imports directly from foreign countries, but from the other States in the Union, which would revive all the mischiefs experienced from the want of a general government over commerce."²

It must not be forgotten that at this era the several states were, in abstract theory, complete and independent sovereigns. Each was foreign to every other in everything, notwithstanding the political alliance between them. From the earliest colonial times the commercial policy of each had been self-centered. Connecticut, before 1650, had taxed the produce of Massachusetts on its way down the Connecticut river to the ocean, and Massachusetts, in retaliation, had taxed all exports from Massachusetts Bay or imports into Boston harbor of goods owned by citizens of the other New England colonies.³ Early in the next century New York (in 1734)

¹ 5 Elliot's Debates 455.

² *Ibid.* 486.

³ The Secession of Springfield from Connecticut, 2 Publications of the Colonial Society of Massachusetts 55.

passed an act laying a tonnage duty on all vessels built or owned in any other of the colonies.¹ Many other instances of similar trade legislation having intercolonial or interstate effect have been collected by a recent writer of merit; and it is believed that his assertion that the doctrine of *Woodruff v. Parham* has not been generally approved by the bar is well warranted.²

A grave point of constitutional construction is never settled beyond further question by judicial decisions. A court can reverse itself, and in such a matter ought to reverse itself, if satisfied that a wrong result has been reached.³ But assuming either that the rule laid down in *Woodruff v. Parham* was correct, or that, if incorrect, it will not be reconsidered, what answer is there to Mr. Justice Nelson's assertion that on this construction of the Constitution Congress is only forbidden to tax exports to foreign countries, and therefore can tax all exports from one state to another?

The Supreme Court said in the income tax cases that nothing could be clearer than that what the Constitution intended to guard against, by its provisions respecting direct taxation, "was the exercise by the general government of the power of directly taxing persons and property within any State, through a majority made up from the other States."⁴ But by the same judgment *Hylton v. United States*⁵ was justified⁶ on the ground that the carriage tax there in question was simply an excise on the use of a carriage, and therefore indirect.

In like manner, a tax on large shipping corporations for the enjoyment of the privilege of shipping from state to state would seem to be an excise on the use of that privilege, and so to impose it to be within the power of Congress, unless withdrawn from it by some prohibition. But where is there any prohibition, unless that against its taxing exports from any state?

It could be strongly argued that the power to regulate commerce between the states would not support such a tax. To regulate the mode of trade in the interest of trade is one thing; to hinder its freedom by taxation for revenue is quite another. The Supreme Court of the United States has intimated that it might

¹ 6 Documents relating to the Colonial History of N. Y. 38.

² Prentice, *The Federal Power over Carriers and Corporations*, 38-48.

³ *The Genesee Chief*, 12 How. (U. S.) 443, 455.

⁴ *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 582.

⁵ 3 Dall. (U. S.) 171.

⁶ P. 579.

be difficult to vindicate, as a regulation by Congress of interstate commerce, a provision that goods brought into one state from another should be for a certain prescribed period exempt from taxation in the former state.¹ It would certainly be much more difficult to vindicate, as such, a regulation by a statute by which such goods were, directly or indirectly, made taxable by the United States.

But the taxing power can fasten upon any business, and if a law is ostensibly to lay a tax for producing revenue, it can hardly be assailed as really intended to achieve a different object. Nor, were the tax so high as necessarily to drive the corporations affected by it out of their interstate business, could this be any objection to its validity.²

Mr. Prentice argues, in his work above cited,³ that to engage in interstate commerce is an inherent right of every American; that the Fifth Amendment forbids its denial by the United States either to natural or artificial persons; and that a corporate franchise to engage in interstate commerce, derived from a state, is beyond federal control. These positions in regard to artificial persons, to say the least, seem questionable. A corporate franchise carries no inherent authority with it, except as against the sovereign from which it came, his subjects, causes heard within his territory, or acts done or to be done there. A corporation is not a citizen of the United States, nor of a state, within the meaning of the constitutional guaranties.⁴

But whether it have the right or not, as against the United States, to engage in commerce between states, cannot affect the power of the United States to tax the exercise of what is claimed to be such a right,⁵ even if carried to such a point that the tax operates to exclude. Nor are there provisions in the national Constitution like those in many of the states, that in matters of taxation all must be treated alike. It is enough if the tax, being indirect, is uniform; and uniformity means only uniformity of geographical application.⁶

There is an *obiter dictum* of the Supreme Court of the United States which relates to the subject of this paper, and is as follows:

¹ *Brown v. Houston*, 114 U. S. 622, 634; *cf. Adair v. U. S.*, 208 U. S. 161, 178.

² *Fairbank v. United States*, 181 U. S. 283, 290.

³ Pp. 33-37.

⁴ *Paul v. Virginia*, 8 Wall. (U. S.) 168.

⁵ *Nicol v. Ames*, 173 U. S. 509, 515.

⁶ *Knowlton v. Moore*, 178 U. S. 41, 106.

"It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Art. 1, sec. 8, that 'all duties, imposts and excises shall be uniform throughout the United States.' There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it."¹

But would the difficulty thus suggested be felt if the tax took the shape which has been already indicated?

It would operate only indirectly on exports from a state. It would operate uniformly in every part of the United States, affecting everywhere precisely the same class of corporations and each member of the class in precisely the same way.

As to the expediency of such legislation, it is not intended here to express an opinion.

Simeon E. Baldwin.

NEW HAVEN.

¹ *Dooley v. U. S.*, 183 U. S. 151, 157.

THE FEDERAL EMPLOYERS' LIABILITY ACT
OF 1908 — IS IT CONSTITUTIONAL?

NO court is unmindful of the gravity attending its procedure when, after argument and full consideration, it finds itself compelled to pronounce an act of the legislature violative of one or more provisions of the Constitution, and therefore not law. In such a case the opening sentences of its opinion are almost sure to declare with what reluctance it is that the court has been brought to set aside the work of a co-ordinate branch of the government. An unfeigned respect for the views of the law-maker is asserted, even though the court be unanimous, and though its conclusions be stated in no doubtful terms.

It is indeed proper and most just that a tribute of respect be thus paid to the legislature, since, no matter how convincing may be the court's exposition of the principles involved in the statute under examination, it must be remembered that the subject matter, in nearly every instance, has received the approval of a judiciary committee in each house, composed of lawyers, many of them of ability and experience. True, a bill may slip through a legislative assembly without attracting notice; but it is very rare, indeed, that a measure of doubtful constitutionality escapes the scrutiny of a certain number of members who are well grounded in the law. We may set it down as a fair presumption that an enactment found upon the statute book does not arrive there until after a competent authority has passed upon the question of its constitutionality.

In the light of these remarks our full meaning will be understood when we characterize as an extraordinary spectacle what was witnessed in the House of Representatives, at Washington, on April 6, 1908, — the passing, we mean, of a bill working a radical change in the common law liability of railroad corporations for injuries done to their employees, and involving a difficult question of constitutional power on the part of Congress, where the vote stood 312 yeas to 1 nay.¹ Three days later the bill, as it came from the House, passed the Senate without a division.

¹ Congressional Record, April 6, 1908, 4557. The negative vote was that of Mr. Littlefield, of Maine. Had Mr. Bannon, of Ohio, been present, he would have voted with Mr. Littlefield, since he had joined with that gentleman in signing a minority report from the Judiciary Committee, which held the bill, as reported by the majority of that committee, to be unconstitutional.

This is not the place to bring forward (much less to discuss) a question of supposed political expediency in legislation. Upon the floor of the House and of the Senate objection was made to this measure as being fundamentally unsound, and beyond the power of Congress to enact. We propose to consider briefly whether Congress has the power under the interstate commerce clause of the Constitution to enact an employers' liability statute for interstate common carriers.

The majority report from the House Judiciary Committee sets forth reasons why the bill should pass, as being a more enlightened and humane dealing with the rights of an employee, and more in harmony with the advanced views that have of recent years found expression in the legislation of England and the Continent as well as in that of many of the states of the Union. The report does not discuss the question of constitutionality. A majority of the committee appears to have assumed that the decision of the Supreme Court of the United States in what is known as the Employers' Liability Cases¹ settles that question. The opinion of Mr. Justice White, together with the dissenting opinions, will be found appended to the majority report, which says: "We believe this bill meets the objections of the Supreme Court to the act of June 11, 1906, known as the Employers' Liability Act."

On the other hand, a minority of two, in a forcible statement of views, cite the Howard case and the Adair case² to sustain their contention that Congress has no power to regulate persons because they engage in interstate commerce; and that the power of regulation possessed by Congress "is confined solely to regulating the interstate commerce business which such persons may do."

This is not the first time that an opinion has been cited by parties on the opposite side of a controversy, each contending that the language of the court makes for him and against his adversary.

We purpose briefly to consider two questions:

1. Has Congress the power to prescribe a rule of liability, in a suit brought by an employee against his employer, for an injury received while engaged in interstate commerce?
2. Has the Supreme Court of the United States decided that this power exists in Congress?

¹ Howard *v.* Illinois Central Railroad Co., and Brooks *v.* Southern Pacific Co., 207 U. S. 463.

² 208 U. S. 161.

In May, 1906, when an employers' liability bill was pending in Congress, the Hon. Lewis E. Payson, formerly a member of Congress from Illinois, and once a judge, appeared as counsel for certain railroad companies, before the Interstate Commerce Committee of the Senate, to oppose its passage. He took the position that Congress has no power to legislate upon the subject; that as to the duties and the pay under a contract for labor and service of an employee with a railroad company, the laws of the state control, and Congress has no power to interfere. In the debate upon the bill in the House Mr. Keifer, of Ohio, argued that the bill was unconstitutional for the same reason. The Supreme Court of the United States, in the Employers' Liability Cases, in January last, decided that the act of 1906 covered intrastate as well as interstate commerce; that the one kind of business could not be separated from the other, so as to save the act from being declared unconstitutional.¹ It is proper to explain that the legislation just enacted has been directed to an elimination of the intrastate feature of the act of 1906,—upon the assumption that nothing further could be needful to render the act as thus amended a constitutional exercise of the power of Congress.

While the bill was under debate in the Senate (April 9, 1908) there were ominous signs that it was conceived by some Senators to rest upon an uncertain foundation. Said Senator Foraker: "I think there is a far more important question lying behind all this legislation . . . and that is the question whether Congress has the right to regulate the relations between master and servant . . . That is a question of supreme importance . . . Because we have avoided in this legislation the point upon which the Supreme Court rested its decision in the other case, it does not follow that this legislation will be constitutional."² Senator Dolliver, who had charge of the bill, admitted as follows: "I do not know what the ultimate decision of the Court would be on the question, if it were presented, of the power of Congress over the relation of master and servant."³

The underlying principle upon which the validity of this legislation must be based is simple enough. There is little room for misconceiving the nature of the power conferred upon Congress to regulate commerce among the states, and no excuse for unduly

¹ 207 U. S. 463.

² Cong. Record, April 9, 1908, 4729.

³ *Ibid.* 4728.

extending the limits of that power. The origin of this clause of the Constitution is familiar to every one who has studied at all that instrument and its history. The condition of our domestic commerce in the days of the Confederation rendered it imperative that Congress should regulate commerce among the states. Nobody questions the wisdom of that investment of power. Nobody denies that the power is plenary in Congress, to exercise it for the good of the entire country.

The purpose of lodging this great power in the hands of Congress was that there should be given to the citizen of a state a warrant of the opportunity, and the right, to pass freely from one state to another, and to take or send his merchandise across state lines, or receive commodities from other states—all after a perfectly free and unrestrained fashion. We may not too often revert to the early declared object of the commerce clause, as just stated,—the guaranteeing of a facility of intercourse and transportation across state lines. In a word, the power intrusted to Congress was designed to insure and expedite the conveyance of passengers and freight with a complete freedom and ease from one state into another.

Keeping in mind this purpose, we shall not find it difficult to fix upon a rule of construction that will tell us whether a proposed measure falls within the line limiting the power of Congress. Whatever facilitates transportation, either in respect to safety or to speed, it is obvious, forms a subject for congressional legislation. Doubt has been expressed in some quarters whether Congress enjoys the same power to *restrict* transportation that it has to facilitate it; but we need not be detained just now by a consideration of this distinction. It might lead us into the speculation whether a federal police power exists or not. Enough for our present purpose to assert that whatever acts directly upon the process of conveying persons or property over a route that extends from one state into another, may be taken up and legislated upon by Congress, as a means of regulating commerce. We are aware of no more satisfactory test of the constitutionality of a bill of this sort than to inquire whether its enactment will render the transportation of passengers or freight safer or speedier.¹

¹ To quote from remarks made by the present writer at a hearing before the House Judiciary Committee (February 26, 1908): "It seems to me that the touchstone to be applied in legislation of this kind, at the very threshold of the inquiry, is to ask what

If the measure becomes a law, will its provisions act upon the subjects of interstate commerce in any particular so as to regulate the process of transportation? The test is a simple one. It is capable of being applied to every case as it arises; nor do we readily comprehend why the legislator should be led astray in his effort to put it into practical operation.

Let us now subject the case in hand to the test thus formulated. The act of 1908 relates to the liability of common carriers by railroad engaged in interstate commerce, where an employee is injured and brings suit against the railroad. Its provisions do away with the fellow-servant doctrine, and are to the effect that proof of contributory negligence shall not bar recovery. The jury is to reduce the damages in proportion to the amount of negligence attributable to the employee.

That the object of this change in the law is to benefit the employee will not be denied. His interest, and the interest of nobody else, appears to have been in the mind of the draftsman of the bill. The passenger, or the owner of freight, is not affected in the remotest degree by this departure from what hitherto has been the rule in most of the states. Well may the dissenting members of the House Judiciary Committee observe: "We are unable to see how interstate commerce can be impeded, obstructed, or hindered, or facilitated, promoted, or aided, either directly or indirectly, in the slightest degree in either case, because the doctrine of fellow-servant does or does not apply as a matter of liability between the employer and the employee engaged in interstate commerce."¹

It is at this precise point that the act fails to bring itself within the proper limits of the power conferred upon Congress. We have examined the opinions of the courts below where the attempt is made to sustain the law as constitutional. We do not find that a single one points out wherein the subject of this new legislation has a direct bearing upon interstate commerce. The line of reasoning seems to be that, inasmuch as Congress has plenary power, it can act upon all the "instrumentalities" engaged in the conduct of interstate transportation. One of these "instrumentalities," it is

is the purpose and object of the legislation. Is it to make easier, or safer, or speedier, to transport freight or carry passengers from one state to another; or, is it to regulate the conduct of the relations between employer and employee, which is an entirely distinct matter from commerce?" *Hearings on H. R. 17036, Washington, Government Printing Office, 1908, p. 106.*

¹ 60th Cong., 1st Sess., H. R. Report, No. 1366, p. 77.

argued, is the working force employed upon the railroad. Hence Congress has unlimited power to legislate as to the rights of this working force in respect to the labor of moving trains. It is said that an employee engaged in the business of moving a train which runs across a state line is a proper subject for Congress to legislate upon, with reference to his comfort and his safety. The Safety Appliance Act is cited in proof of the soundness of this position. But the Safety Appliance Act bore directly upon the problem of providing a safe mode of conveyance. The right to maintain a suit against his employer, we submit, has nothing whatever to do with the safety of the train or of the employee. It is but a vague and confused method of reasoning, this — to insist that because Congress can provide the means for safe and speedy transportation, it can therefore lay down the terms upon which the common carrier shall be liable in a suit brought by the employee for a personal injury, sustained while engaged in operating a train.

Congress may, if it see fit, enact a law requiring an employee to wear a uniform, to pass a test for color blindness, to possess certain prescribed qualifications as to health or education. Such requirements as these, it is conceived, have an obvious relation to the safe and speedy conduct of railroad transportation. Congress may not require employees to confine themselves strictly to a vegetable diet, or to read at sight a chapter from the Greek Testament. Why not? Simply because there is lacking in these instances a plain adaptation of the requirements to the better means of transacting business by railroad.

Mr. Justice Moody, in a dissenting opinion, argues elaborately to uphold the act of 1906 upon general principles. He says:

“ . . . if Congress, in the exercise of its plenary power over interstate and foreign transportation, deems that the safety of that transportation would be increased by enacting that those employed in it shall have a different remedy for injuries sustained by its negligent conduct than that furnished by the laws of the states, this court cannot, without overstepping the boundary which separates the judicial from the legislative field, declare the enactment void.”²

This amounts to arguing that Congress can do pretty much as it pleases in its exercise of power under the interstate commerce clause. All that the Supreme Court of the United States, according to this reasoning, is permitted to ascertain is, whether or not

¹ 207 U. S. 533.

Congress, when it enacted the law, supposed that it was facilitating commerce. Such, we submit, was not the view taken by Chief Justice Marshall in those memorable words so frequently quoted of late years:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."¹

"Which are plainly adapted to that end" is a qualification full of significance. It cannot be ignored. It is the duty of the Supreme Court of the United States to determine, in a case brought before them, whether the means adapted by Congress for carrying into effect the power intrusted to it by the Constitution are or are not *plainly* adapted to the legitimate end in view. We know of no justice who has dealt with this statute and pointed out how the privileges of the Employers' Liability Act do actually contribute to the safety, or even convenience, of passengers, owners of freight, or the employees of a railroad company.

We think we are not speaking dogmatically when we confess that the more closely we study this interesting question, the more firmly do we continue in the belief that Congress has no power to disturb the law of a state with respect to the conduct of suits, for injuries incurred within her borders, brought by employees against railroads engaged in interstate commerce. We find ourselves in complete accord with the criticisms advanced in argument for one of the defendants in error in the Employers' Liability Cases, as follows:

"Such legislation is not a regulation of commerce, and Congress has no more power to define the liability of common carriers, engaged in interstate commerce, to their employees than it has power to legislate upon the domestic relations of merchants engaged in interstate commerce. The argument that this act is a constitutional regulation of interstate commerce proceeds upon the fundamentally erroneous theory that Congress has power to regulate persons engaged in interstate commerce in all the relations of life,—whereas the power conferred by the Constitution is only the regulation of the commerce itself."²

The second question, Has the Supreme Court of the United States decided that this power exists in Congress? may be dis-

¹ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 421.

² 207 U. S. 479-480.

posed of in a few words. As reported in the Employers' Liability Cases,¹ the opinion of Mr. Justice White, who is speaking for the majority of the court, occupies fourteen pages. Only two pages are devoted to the inquiry whether Congress has power to enact the statute in question. Mr. Justice Peckham in a concurring opinion (with whom agree the Chief Justice and Mr. Justice Brewer) remarks:

"I concur in the proposition that as to traffic or other matters within the state, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it."²

It is interesting to note with what rapidity Mr. Justice White passes upon the great, underlying question of the power of Congress. "We do not think we are at liberty," he says, "to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress."³ He proceeds with the discussion, he tells us, in order that the court may not mislead Congress and thus give rise to future contention. The result seems to be that nobody is assured whether this particular question has been decided or not.

It is a noteworthy circumstance that Mr. Justice White omits to declare it to be *necessary* to decide the point as to the underlying power of Congress. The two pages just referred to are mostly taken up with assertions that the unsoundness of a denial of the power is demonstrable. With great respect, however, to the learned justice, we are compelled to admit that after diligent search we have been unable to discover that any substantial reason has been brought forward to sustain the position that the power to enact this legislation exists in Congress.

True, the opinion does say: "... we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred."⁴

But whoever seeks in this region of the opinion for a solid reason to justify a claim for the existence of the power will be disap-

¹ 207 U. S. 463-541.

² *Ibid.* 504.

³ P. 494.

⁴ P. 495.

pointed. Nor is there a distinct, unequivocal announcement in terms that the court actually so decides.

The following language later along in the opinion well describes the character of the enactment. It serves likewise to engender in the reader's mind a doubt whether the writer of the opinion ought to be held to the conclusion that Congress was acting within the limits of an acknowledged authority:

"From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do, — that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce."¹

We need not pursue the inquiry further. To our mind there seems not the least doubt that the court will in the future feel itself not to be bound by anything further, as declared in the opinion of the majority, than what the three concurring justices above named have said that it was necessary to decide. Litigants are encouraged to believe, therefore, that the fundamental question still remains open.

The scope of this article does not permit an inquiry into other grounds upon which it may be contended that the act of 1908 is unconstitutional. We may note that the negligence giving a right to bring suit is that "of any of the officers, agents, or employees of such carriers," not restricting it to such officer, etc., while engaged in the conduct of interstate-commerce business. Nor does the statute found the right upon the extra-hazardous nature of the employment. These features of the bill were commented upon by the minority of the House Judiciary Committee, in their report,² as affording reasons for pronouncing the bill unconstitutional. There is another ground which should be carefully examined. The act deals exclusively with "common carriers by railroad." Common carriers on the highway, by canal, and carriers generally by water, are not exposed to the liabilities named in the statute. A plau-

¹ P. 497.

² Printed in Congressional Record of April 6, 1908, pp. 4546, 4555.

sible argument, to say the least, may be urged to the effect that this is special class legislation, which the courts ought not to sustain.

This highly important enactment, it is to be hoped, will soon be brought before the courts, for a determination of the several difficult questions involved. The political and the sociological aspect of a mass of legislation that has recently been proposed of which this Employers' Liability Act forms a part, makes it all the more necessary that rigid scrutiny be applied to these questions of constitutional power. Our article has been confined to an inquiry into the true meaning of the term "to regulate commerce among the several states." It is an inquiry that may well challenge the attention of every lawyer who is watching the effect upon legislation of the drift of the public sentiment of the hour. May we not expect that before long the highest court in the land will interpret this grant of power from the states in terms that shall put to rest many a strange doctrine of disquiet, and in a measure restore to the business world that sense of stability which it was wont to enjoy, — that confidence which lies at the foundation of the nation's prosperity and contentment ?

Frank Warren Hackett.

WASHINGTON.

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THE LAW SCHOOL. — Several changes in the courses and in the faculty are announced. Dean Ames will give both second and third year Equity, the latter extending only through the first half year. The course on Insurance, again under Professor Wambaugh, will be given two hours each week throughout the year. Professor Beale has been appointed to the new chair, the Carter Professorship of General Jurisprudence, endowed by the late Mr. James C. Carter, LL.B. 1853, and under it will give during the second half year a new course on Jurisprudence. Professor Brannan, who has been made Bussey Professor of Law, will conduct the course on Damages. Mr. L. F. Schaub, LL.B. 1906, will give Persons, and Mr. A. R. Campbell, LL.B. 1902, will again, as two years ago, conduct the extra course on New York Practice. Professor Warren and Professor Wyman have been appointed to full professorships.

THE FIDUCIARY CHARACTER OF A PROMOTER. — It is a rule of equity that an agent or trustee, acting for his beneficiary in a transaction in which he himself is personally interested, must exhibit a scrupulous degree of candor toward his principal in order to escape the imputation of fraud.¹ A similar duty is said to be owed by a promoter to the corporation which he launches forth. If he does not fully disclose his private interest in matters in which he causes the corporation to engage — for example, the sale of his own property to the corporation — he is liable to it for his secret profits,² or for its losses,³ or the corporation may rescind the transaction.⁴ He can-

¹ Wardell v. Railroad Co., 103 U. S. 651.

² Yale Gas Stove Co. v. Wilcox, 64 Conn. 101.

³ Re Leeds & Hanley Theatres, etc., [1902] 2 Ch. 809.

⁴ Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221.

not avoid liability by purporting to make disclosure to the corporation and secure its assent through a board of directors composed of his friends and puppets;⁶ for it is part of his duty as a fiduciary, when dealing with the corporation, to see that members whose interests may be adverse to his own are fairly and independently represented.⁶ It may be, however, that no such persons are among the incorporators, or have subscribed to the stock, at the time when the transaction is approved by the dummy board. In that case, if an adverse interest is not expected ever to exist, as when all the stock is to be issued to the promoter and his friends with the understanding that it is not to be transferred, clearly at no time does the promoter bear a fiduciary relation, since the interest of all concerned is identical;⁷ and hence the corporation cannot complain of dealings with a dummy board, even though adverse members subsequently come in.⁸

But as to the situation where a future adverse interest is contemplated and later exists,⁹ the decisions are conflicting and the opinions misleading. Much attention is paid to representations in the prospectus,¹⁰ and to the promoter's duty not to deceive future allottees,¹¹ matters obviously relevant only to the rights of the individual subscribers. But to afford the corporation a remedy, there must be found, contemporaneous with the transaction, a duty to the corporation and a breach thereof. These essentials appear to exist, it is believed, when the launching of a corporation is considered as one single undertaking, over which the promoter exercises peculiar control, and in the management of which, therefore, he is to be held to a high standard of integrity. If, as part of this single initial enterprise, an adverse interest, whether by transfer or by original allotment, to furnish either fixed or working capital of any amount, is contemplated, the promoter-vendor must provide for independent representation. Consequently, to consummate a doubtful transaction before the adverse interest is in at all is a breach of his duty to the corporation. If, on the other hand, the adverse interest though contemplated is not a part of the initial scheme, there is no present duty not to deal with a dummy board.¹² Such a line of division, it is true, has not been expressly adopted by any court; but it is submitted to be the most practicable in the light of principle and authority.

In applying the suggested test, the fact that all, some, or none of the stock had been issued at the time of the transaction with the dummy board, would be material only as indicating the nature of the initial scheme. However, no case has been found where the corporation was allowed to repudiate the assent of its shareholders, given when all the stock had been issued.¹³ In fact, the United States Supreme Court has recently held that where forty shares out of a contemplated hundred and fifty thousand had been issued, the promoter could safely consummate an unfair contract with a dummy board, though immediately afterwards twenty thousand shares were issued to the public, as had been planned. *Old Dominion, etc., Co. v. Lewisohn*, 210 U. S. 206.

⁶ *Yeiser v. U. S. Board, etc., Co.*, 107 Fed. 340. *Contra*, *Densmore Oil Co. v. Densmore*, 64 Pa. 43.

⁶ *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; affirmed 3 A. C. 1218.

⁷ *Re British Seamless Paper Box Co.*, 17 Ch. D. 467.

⁸ *Parsons v. Hayes*, 14 Abb. N. C. 419.

⁹ If adverse members are contemplated but never materialize, the corporation of course has no complaint. *Re Ambrose Lake, etc., Co.*, 14 Ch. D. 390.

¹⁰ *Gluckstein v. Barnes*, [1900] A. C. 240.

¹¹ *Re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566.

¹² *Blum v. Whitney*, 185 N. Y. 232.

¹³ *Cf. Foster v. Seymour*, 23 Fed. 65.

The opinion was delivered by Mr. Justice Holmes, who several years ago, on the Massachusetts bench, concurred in a contrary result, in a case substantially similar except for the fact that there no stock had been issued at the time of the alleged assent.¹⁴ Upon this narrow difference the present decision appears unnecessarily technical, and is opposed to the doctrine of three important jurisdictions,¹⁵ in one of which the same facts were presented against a different defendant.¹⁶ Moreover, to hold broadly that assent by any board at any time waives the fiduciary obligation, seems deplorably to cripple a beneficent and well-established rule.

LIABILITY FOR INTERFERING WITH TRADING STAMP CONTRACTS. — The giving of trading stamps by merchants to their customers as a premium upon cash purchases is one of the more recently developed methods of advertising. The merchant buys these stamps from an issuing company which contracts, among other things, to redeem in goods of various sorts all stamps regularly issued to customers when they are presented in lots of a certain number. The right of a holder of stamps regularly issued to redemption arises from the contract between the stamp company and the merchant, of which the stamp holder is a beneficiary; or by a fulfilling of the conditions of any sufficiently specific public offer to a unilateral contract which the stamp company may make. The trading stamp, therefore, like a railroad¹ or lottery² ticket, is a contractual obligation, a chose in action. At first the stamps were issued with no limitation upon their transferability, and the public accepted them as transferable obligations. As in the case of promissory notes and railroad tickets,³ the courts took cognizance of this general understanding and assumed that the stamps were transferable.⁴ Such stamps are therefore analogous to promissory or bank notes payable to bearer, and like them assignable, not by giving the assignee a right to sue in the name of the assignor, but by a true transference and extinguishment of the assignor's right. The ownership of an obligation is governed by the same rules of law as the ownership of a chattel, and any such stamp holder therefore should be free to transfer his property right by any legal means in his power. Most courts, however, have at the suit of the stamp company enjoined merchants who are not subscribers to the company's scheme from purchasing stamps from holders and giving them as premiums to their customers.⁵ But if our analysis of the nature of the trad-

¹⁴ Hayward v. Leeson, 176 Mass. 310.

¹⁵ Pietsch v. Milbrath, 123 Wis. 647; New Sombrero Phosphate Co. v. Erlanger, *supra*; Old Dominion, etc., Co. v. Bigelow, 188 Mass. 315. *Contra*, Tompkins v. Sperry, Jones & Co., 96 Md. 560.

¹⁶ Old Dominion, etc., Co. v. Bigelow, *supra*.

¹ There is a lack of harmony among the cases, but the modern tendency is to hold that a railroad ticket is a contract. See 1 HARV. L. REV. 17.

² Homer v. Whitman, 15 Mass. 132; and see Shankland v. Corporation of Washington, 5 Pet. (U. S.) 390. Although the trading stamp is similar in its nature to the lottery ticket, the trading stamp scheme is unlike a lottery in that it involves no element of chance. Recent statutes forbidding the trading stamp business have therefore been universally declared unconstitutional by the courts. Madden v. Dycker, 72 N. Y. App. Div. 308; Winston v. Beeson, 135 N. C. 271.

³ Sleeper v. R. R. Co., 100 Pa. St. 259.

⁴ Sperry & Hutchinson Co. v. Hertzberg, 69 N. J. Eq. 264, 272.

⁵ Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 Fed. 833; Sperry & Hutchinson Co. v. Temple, 137 Fed. 992; S. & H. Co. v. Brady, 134 Fed. 691; S. & H. Co. v. Asch, 145 Fed. 659. *Contra*, S. & H. Co. v. Hertzberg, *supra*, and see S. & H. Co. v. Mechanics' Clothing Co., 128 Fed. 800; *ibid.* 1015

ing stamp is correct, in the absence of fraud or interference with the contracts between the stamp company and its subscribers, the cases seem wrong in forbidding this particular transfer of property, even though it was not contemplated by the plaintiff and may injure his business, nor, to support such rulings, does it seem possible to raise any implied obligation that the stamps shall not be used again for advertising purposes.

In a recent case non-transferable stamps were issued, large numbers of which the defendant purchased or exchanged for its own stamps. The stamps thus obtained were sold to brokers, redeemed in large lots, or resold to the plaintiff's subscribers at a lower rate than the plaintiff could sell them. The court enjoined such trafficking in the plaintiff's stamps. *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 Fed. 219 (Circ. Ct., N. D. Ill.). The issuing company may place a condition of non-transferability upon the redemption of its stamps, as a railroad may upon the use of an excursion ticket. The purchaser of such a railroad ticket makes a formal, as distinguished from a consensual, contract not to transfer it, and the courts have enjoined ticket-scalpers from interfering in such a contract.⁶ It is impossible to find any such enforceable contract between the customer who receives a trading stamp and the stamp company: they are never in privity, since the merchant does not act as agent for the stamp company. But such a formal contract is made between the merchant and his customer — in return for the premium the purchaser agrees to abide by the conditions under which it is given. The equitable jurisdiction to enjoin interference in this contract would seem to be clear.⁷ Even though we discard this theory, it would seem that the presentation of non-transferable stamps for redemption by any but the original holders is a fraud upon the stamp company. And the perpetration of such fraud should be enjoined where, as in the present case, the legal remedy is inadequate by reason of the impossibility of distinguishing *bona-fide* holders of stamps from transferees.

THE IMPEACHMENT BY A STATE COURT OF THE JUDGMENT OF A SISTER STATE. — The question as to how far the judgments of the courts of a foreign country should be regarded as conclusive of the rights and liabilities thus determined has been the source of much controversy among jurists. It is recognized by all that some effect should be given such judgments, but without legislative sanction the authorities generally have hesitated to accept them as conclusive. The early English authorities are not harmonious. By some a foreign judgment was regarded as conclusive; by others, as merely *prima facie* evidence of an obligation enforceable in England, to be rebutted by showing the injustice of the claim, its fraudulent inception, or the lack of jurisdiction in the court over either the cause or the parties.¹ It seems to be settled in England now, however, that a foreign judgment, if rendered by a court of competent jurisdiction and not fraudulently obtained, is conclusive.² In this country the courts at first almost universally followed those English authorities which regarded such judgments as inconclusive and only *prima facie* evidence of the obligation. They did not, however, de-

⁶ Ill. Cent. Ry. Co. v. Caffrey, 128 Fed. 770; Bitterman v. Louisville, etc., Ry. Co., 207 U. S. 205. See 21 HARV. L. REV. 365.

⁷ Angle v. Chicago, etc., Ry. Co., 151 U. S. 1.

¹ Story, Conflict of Laws, 8 ed., 826, 827 and cases cited.

² Bank of Australasia v. Nias, 16 Q. B. 717; Goddard v. Gray, L. R. 6 Q. B. 139.

termine the extent to which they would allow them to be impeached.³ The present tendency of our courts is in the direction of the modern English view.⁴

This doctrine of the full recognition of the judgment of a foreign court is theoretically unimpeachable. Within the jurisdiction in which it is rendered a judgment in a personal action signifies that the law of that jurisdiction recognizes and asserts that the plaintiff has or has not certain legal rights and that the defendant is or is not under corresponding legal obligations.⁵ And, of course, within that jurisdiction those legal rights and liabilities thereafter exist so long as the judgment remains in force. Logically, it would seem, a court should recognize private rights acquired through a foreign judgment to exactly the same extent that it recognizes private rights acquired in any other manner under foreign laws.⁶ And although, aside from a question of comity, there is no reason in the nature of things why a court should recognize rights acquired under foreign law, yet if it recognizes them at all it should not discriminate against judgment rights.

But for the Constitution and Acts of Congress passed in pursuance of its provision requiring each state to give "full faith and credit" to judgments rendered in sister states, such judgments would be treated as foreign judgments, as they were before the formation of the Union.⁷ The early doctrine as laid down by Chief Justice Marshall was that the judgment of a state court when sued on in another state could not be impeached on its merits, even for fraud.⁸ The only ground for impeachment was lack of jurisdiction of the court rendering it. A dictum in a later case⁹ has been thought by some to mean that the original claim upon which the judgment of a sister state was based could be examined more extensively than was formerly supposed. A recent case, however, holds that a judgment of a Mississippi court is not impeachable in Mississippi, even if the original claim is based upon a contract made in Mississippi and illegal under Mississippi law. *Fauntleroy v. Lum*, 210 U. S. 230. On principle, as already seen, the decision seems sound. It is an extreme case and should settle all further controversy as to the conclusiveness of sister-state judgments.

RECOVERY OF PAYMENTS MADE UNDER COMPELSION. — The general rule is that one cannot recover money voluntarily paid with full knowledge of the facts, although the claim in satisfaction of which the payment was made was, in fact, illegal.¹ The policy of the law denies that a man may take inconsistent positions, repudiate his acts, and disturb a settlement voluntarily made by him, even though no sufficient consideration was received.² But this objection is not applicable to acts done under compulsion. It is therefore well settled that in the absence of consideration payments made

³ Story, *Conflict of Laws*, 8 ed., 829.

⁴ *Ritchie v. McMullen*, 159 U. S. 235. They will not, however, go the full length of the English doctrine; for a foreign judgment is not regarded as conclusive when rendered by a state which does not reciprocally treat our judgments as conclusive. *Hilton v. Guyot*, 159 U. S. 113.

⁵ See 1 Black, *Judgments*, 2 ed., § 1.

⁶ *Godard v. Gray*, *supra*.

⁷ See *Buckner v. Finlay and Van Lear*, 2 Pet. (U. S.) 586, 592.

⁸ *Hampton v. McConnell*, 3 Wheat. (U. S.) 234.

⁹ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

¹ *Elston v. City of Chicago*, 40 Ill. 514.

² *Peters v. R. R. Co.*, 42 Oh. St. 275.

involuntarily or under compulsion may be recovered at law. Recovery is founded, not, as in equity, on a rescission through the unfair advantage taken, but on a quasi-contract through failure of consideration. The effect of the compulsion is simply to explain the apparent inconsistency of the payment and the repudiation.³ This rule mitigates the harshness of the narrow common law doctrine of duress. For, whereas the equitable doctrine of undue influence is broad and sweeping, extending to all transactions in which one party has been deprived of a free and deliberate judgment,⁴ the common law doctrine of duress is limited to actual coercion, by injury to or unlawful imprisonment of the person, or threats of such injury or imprisonment.⁵

The test for determining what amounts to such compulsion as will justify a recovery under the rule must of necessity be somewhat vague, considering the infinite variety of possible situations. "There must be some actual or threatened exercise of power, possessed, or believed to be possessed, over the person or property of another, from which the latter has no other means of immediate relief than by paying."⁶ Hence it has been held that a payment is involuntary if made to prevent a wrongful taking or detention of the plaintiff's property,⁷ or to avoid injury to the plaintiff's business,⁸ or to induce the defendant to perform a duty.⁹ But in any event, although all the cases are not clear on the point, there must be some necessity actually existing or reasonably believed by the plaintiff to exist; otherwise he could withhold payment for a determination of the dispute at law. Failing that, he has no excuse for repudiating his act.

In a recent case a subscriber, with full knowledge of the facts (though probably not of the law) and without objection paid a telephone company a higher rate than it could legally charge. It was held that he could not recover. *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535. The absence of protest is not fatal to recovery, just as its presence will not make an otherwise voluntary payment involuntary.¹⁰ It is effective merely as evidence tending to show that compulsion was the inducing cause of the payment.¹¹ When the parties stand on unequal footing, as often happens in the case of a public service corporation and an individual, there is great opportunity for compulsion, and hence there may frequently be a recovery.¹² But the case seems correct in holding that the mere fact of inequality does not, as a matter of law, render the payment compulsory. If one objects that the result is unjust to the plaintiff, he should quarrel, not with the refusal of the court to extend the doctrine of compulsory payments, but with the rule which denies recovery of a payment made under a mistake of law.¹³ To recover on the former ground, the plaintiff should show not only the opportunity for compulsion, but that in fact compulsion was exercised and did induce the payment.

³ Pollock, *Contracts*, 3 Am. Ed., 732.

⁴ *Williams v. Bayley*, L. R. 1 H. L. 200.

⁵ *Skeate v. Beale*, 11 A. & E. 983.

⁶ *Radich v. Hutchins*, 95 U. S. 210; *Brumagin v. Tillinghast*, 18 Cal. 265.

⁷ *Baldwin v. Liverpool, etc.*, S. S. Co., 74 N. Y. 125.

⁸ *Swift & Co. v. U. S.*, 111 U. S. 220.

⁹ *Dew v. Parsons*, 2 B. & Ald. 562.

¹⁰ *Lamborn v. Commissioners*, 97 U. S. 181.

¹¹ *Wessel v. Land & Mortgage Co.*, 3 N. D. 160.

¹² *G. W. Ry. Co. v. Sutton*, L. R. 4 H. L. 226; *Peters v. R. R. Co.*, *supra*; *R. R. Co. v. Coal Co.*, 79 Ill. 121.

¹³ See 21 HARV. L. REV. 225.

THE LIABILITY OF A COUNTY FOR TORTS. — There has been much confusion as to municipal liability for torts. The general rule is that a city is liable for personal injury caused by the negligent act of an employee or agent engaged in the exercise of duties for local benefit, while if the injury is a result of the performance of duties of a purely public nature the city is not liable.¹ The courts reason that a city is a municipal corporation proper, created for certain self-interested purposes at the request of its citizens, and therefore, like any other corporation, under an implied liability for torts, except where its agents are carrying out some duty which is imposed on the city by the legislature or by law purely for the benefit of the general public, and from which the city, as such, acquires no profit.²

A county, on the other hand, cannot generally be held liable for torts.³ The county is not a municipal corporation proper; rather, it is an arm of the sovereign power—a political subdivision of the state, created by the legislature for the purpose of a more convenient and distributive administration of government, and clothed with some of the attributes of sovereignty, exercising its functions, not by vote or direction of its inhabitants, but simply by command of the legislature which created it.⁴ Therefore, since it is a branch of the sovereign power, it cannot usually be held liable to one injured by the negligence of its employees while they are performing the duties enjoined upon it. Thus, a county is not liable for an injury to a traveller resulting from the exercise of its statutory duty to repair a road.⁵ But where the result of the negligence is a direct injury to property rights, as where mud, water, or other material is dumped on the land of a private person, it is impossible to exempt the county from liability without violating the constitutional provision against taking property without compensation.⁶ The distinction thus taken is sound, for even a branch of the sovereign power cannot be created free from liability for the violation of the constitutional rights of individuals.⁷ The sole remaining objection to liability, that the inhabitants of the county cannot be made to satisfy the judgment, is no longer of weight, because the liability will fall on the county fund and not on the estates of individuals.⁸

In a recent case a county employee, while engaged in repairing a road, negligently diverted a water-course, thereby causing the collapse of a bank of earth and rocks which poured on the plaintiff's land and destroyed his house. The county was held liable on the ground that there is no difference between the liability of municipalities and counties. *Matsumura v. County of Hawaii*, 19 Haw. 18. Although the court reached the right result, it failed

¹ *Rhobidas v. Concord*, 70 N. H. 90; *Hill v. Boston*, 122 Mass. 344. See also 19 HARV. L. REV. 65.

² *Hill v. Boston*, *supra*; *Howard v. Worcester*, 153 Mass. 426; *Murtaugh v. St. Louis*, 44 Mo. 479.

³ *Fry v. County of Albemarle*, 86 Va. 195; *Com'rs of Hamilton County v. Mighels*, 7 Oh. St. 109; 7 Am. & Eng. Encyc. L. 947.

⁴ *Downing v. Mason County*, 87 Ky. 208; *Smith v. Carlton County Com'rs*, 46 Fed. 340.

⁵ *White v. Com'rs of Chowan*, 90 N. C. 437; *Barnett v. Contra Costa County*, 67 Cal. 77. These cases represent the great weight of authority. A different view has prevailed in Maryland, Pennsylvania, and Iowa. It is believed that in the latter state the doctrine is weakening. See *Packard v. Voltz*, 94 Ia. 277.

⁶ *Eaton v. B. C. & M. R. R.*, 51 N. H. 504; *Gilman v. Laconia*, 55 N. H. 130, 131.

⁷ It is this principle that makes a county liable for infringement of patent rights. *May v. Logan County*, 30 Fed. 250.

⁸ In a famous English case the court denied liability because there was no corporate fund. *Russell v. Men of Devon*, 2 T. R. 667. The case has been often followed without reference to this difference between modern and ancient counties.

to draw the proper distinction between cities and counties. One is a local organization exercising many private and some public duties; the other is a public and political subdivision of the state, exercising public duties, and generally exempt from liability except where constitutional rights would be infringed by the exemption.

THE EFFECT OF INTENT ON SURRENDERS BY OPERATION OF LAW. — When a lessee of an unexpired term takes from his landlord a new valid lease of the same premises, the English courts hold that as a rule of law the act itself amounts to a surrender of the old term irrespective of any intention of the parties.¹ Such a surrender is necessary in order that the prior term may merge in the reversion, and without that merger the landlord cannot make a valid new lease. By accepting the new lease the tenant recognizes the landlord's power to grant it, and this he is afterwards estopped to deny. In the United States, however, there is a distinct tendency to modify the rule by inquiring into the probable intent of the parties. Thus, where covenants in the original leases ensuring to the lessee the right to recover the value of his fixtures were lacking in the new leases, there was held to be no surrender, on the ground that the lessee could not be held to have intended to deprive himself of the protection of the covenants.² This milder American view derives support from the many English decisions in one class of cases which do regard the probable intention of the parties. For it is universally held that there is no surrender unless the new lease to the lessee is valid according to its terms.³ Although the English courts in reaching this result seem somewhat inconsistent, any other, in forcing the lessee to give up a valid existing lease for one which he could not enjoy, would be manifestly unjust.

But where the new invalid lease is to a stranger it might be urged that the usual rule might be applied, since the injustice to the old lessee would not result, as he has no interest in the validity of the new lease. In a recent case the lessee in the new void lease was a *cestui que trust* of the original lease. It was held that the old lease to his trustee was not surrendered. *Zick v. London United Tramways, Ltd.*, [1908] 2 K. B. 126. Although legally the two lessees are different persons, yet in both leases the real party in interest is the same, and it obviously could not have been the *cestui's* intention to allow his trustee to surrender the old term when the new lease to himself was void. However, where the party in interest is in fact different, what authority there is tends the same way.⁴ For, while the tenant may have no concern in the validity of a new lease to a stranger, the interest of the landlord is the same no matter to whom the new lease runs. He cannot intend that a new void lease should involve an actual surrender of the original lease, since that would leave him without any hold over either other party. And since the landlord must be considered equally with the tenant, his intention

¹ Parke, B., in *Lyon v. Reed*, 13 M. & W. 285.

² *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 579; *Flagg v. Dow*, 99 Mass. 18; *Thomas v. Zumbalem*, 43 Mo. 471.

³ *Wilson v. Sir Thos. Sewell*, 4 Burr. 1975, 1980; *Davison v. Stanley*, 4 Burr. 2210; *Roe d. Earl of Berkeley v. Archbishop of York*, 6 East 86, 104; *Doe d. Biddulph v. Poole*, 11 Q. B. 713, 720; *Smith v. Kerr*, 108 N. Y. 31.

⁴ *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400. See also *Whitney v. Meyers*, 1 Duer (N. Y.) 266.

unconditionally to surrender must likewise be present. The authority, therefore, is to be supported.

Since the courts consider the probable intention of the parties in these cases, it is difficult to see why the intention, expressed or necessarily implied, should not be examined where the new lease is valid according to the terms. In such cases the English judges say that the tenant is estopped to deny the landlord's power to make the lease, and that therefore a surrender results.⁶ But they refuse to find the estoppel where the new lease, though valid, does not convey the exact interest contemplated.⁶ That is, the tenant is estopped if the new lease gives him what he was intended to receive; otherwise not:⁷ or, in other words, the estoppel itself is resolved into a question of intention. Consequently, the view seems preferable, that no surrender should result even where the new lease is valid, if the surrender would violate an intention clearly to be implied from the common sense of the transaction.

RECENT CASES.

AGENCY — LIABILITY OF UNDISCLOSED PRINCIPAL — PROMISSORY NOTE GIVEN BY AGENT. — The plaintiff sold realty to A and received in payment negotiable notes, signed "A, Trustee." A, unknown to the plaintiff, was acting as an agent of the defendants. The plaintiff sued upon the original contract for the purchase price. *Held*, that the plaintiff can recover. *Coaling Coal & Coke Co. v. Howard*, 61 S. E. 987 (Ga.).

The majority of American courts hold that recovery cannot be had on a promissory note against one whose name does not appear thereon, even if his agent signs the note and attaches words to his signature denoting his agency. *Manufacturers & Traders Bank v. Love*, 13 N. Y. App. Div. 561. Following the well-established rule as to the liability of an undisclosed principal, recovery is usually allowed if an action in general assumpsit is brought for the original consideration. *Harper v. National Bank*, 54 Oh. St. 425. The fact that the agent has given his note does not render the original contract non-existent so as to prevent a resort to it when the real parties are disclosed. The Georgia courts follow the usual presumption that the notes are not accepted as payment of the debt but merely as additional security. *Kirkland v. Dryfus & Rich*, 103 Ga. 127. Even where the opposite presumption prevails it is held to be overthrown in the case of an undisclosed principal, for the notes are accepted in ignorance of facts as to the real principal. *Lovell v. Williams*, 125 Mass. 439. The result reached in the present case, therefore, is entirely sound.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN CONTRACT — WIFE'S AUTHORITY TO PLEDGE HUSBAND'S CREDIT. — The defendant allowed his wife money sufficient for household expenses, but did not expressly forbid her to pledge his credit. The plaintiff, knowing nothing of the allowance, sold meat to the wife on her husband's credit. *Held*, that the defendant is not liable. *Slater v. Parker*, 24 T. L. R. 621 (Eng., K. B. D., May 11, 1908).

If the husband makes adequate provision for his wife, there is no so-called agency by necessity. *Compton v. Bates*, 10 Ill. App. 82. But by giving the wife an allowance for the purchase of necessities, he constitutes her his agent in fact for that purpose, though perhaps impliedly prohibiting the pledging of his credit. It would seem, then, that it should be left to the jury whether this express authorization carries with it an apparent authority or incidental power

⁶ *Lyon v. Reed*, *supra*.

⁶ *Lloyd v. Gregory*, W. Jones, 405.

⁷ Cf. Wms., Saunders, 5 ed., 236 c.

to pledge the husband's credit. *Bentley v. Doggett*, 51 Wis. 224. If such incidental power is found, the merchant, according to a well-settled principle of agency, should recover unless he knows that the wife is expressly authorized to buy only for cash. *North River Bank v. Aymer*, 3 Hill (N. Y.) 262. The court in the present case, however, following the later English cases, declares that as a matter of law, any presumption of the wife's authority to pledge her husband's credit is rebutted by his giving her the allowance. *Morel Bros. v. Westmoreland*, [1903] 1 K. B. 64. This reasoning, however, seems to be a confusion of agency by necessity with agency in fact. See *Santer v. Scrutchfield*, 28 Mo. App. 150.

BANKRUPTCY — DISSOLUTION OF LIENS — WARRANT OF ATTACHMENT WITHIN FOUR MONTHS. — The plaintiff brought an action for breach of contract. A warrant of attachment was issued on the goods of the defendant, which then undertook to pay on demand any judgment which might be recovered against it in the action. On producing the bond of a proper surety the defendant obtained an order discharging the attachment in full and received its property back. Within four months of the date of issue of the warrant the defendant filed an involuntary petition in bankruptcy and was adjudged a bankrupt. The defendant applied for an order vacating the warrant of attachment. *Held*, that the warrant may not be vacated. *King v. The Block Amusement Company*, 126 N. Y. App. Div. 48.

No liability arises on an attachment bond until judgment is granted against the principal. Bankruptcy intervening, the principal should be allowed to stay proceedings, and later plead his discharge in bar, thereby relieving the surety. *In re Eastern Commission and Importing Company*, 129 Fed. 847. This is the rule in Massachusetts. *Johnson v. Collins*, 117 Mass. 343. An earlier New York case assumed that the attachment bond was a security substituted for the plaintiff's lien, and that the Bankruptcy Act of 1867 did not dissolve the attachment, so that the plaintiff was allowed to proceed to judgment on the warrant and, though perpetually enjoined from enforcing that judgment against the defendant, because of the adjudication, was allowed to hold the surety. *McCombs v. Allen*, 82 N. Y. 114. Without considering the correctness of that interpretation of the earlier statute, it is certain that an attachment occurring within the four months is dissolved by the clear intentment of § 67 of the Act of 1898, and the fiction of a substituted security only leads, as in the principal case, to an inequitable result; for while the bankruptcy has destroyed the lien against which the sureties bound themselves, yet they are still held liable.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — PROPERTY HELD BY STATE COURT PRIOR TO BANKRUPTCY. — A sheriff had taken property from A under a writ of replevin issued by a state court. On the following day A filed a petition in bankruptcy in a federal court. The receiver petitioned that the sheriff be directed to deliver the property to him. *Held*, that the federal court has no jurisdiction. *Matter of Rudnick & Co.*, 20 Am. B. R. 33 (C. C. A., Second Circ.).

Section 67 *f* of the Bankruptcy Act of 1898 invalidates all levies, judgments, attachments, and liens obtained against the bankrupt within four months of the adjudication. It has been held, in an unreasoned decision, however, that the term "all levies" is comprehensive enough to include a seizure under replevin process. *In re Haynes*, 123 Fed. 1001. See *In re Hymes, etc., Co.*, 130 Fed. 977, 979, and *In re Weinger, Bergman & Co.*, 126 Fed. 875, 877. But as the court points out in the principal case, a requisition in replevin deals primarily with the property of the plaintiff in that action, while § 67 *f* of the Bankruptcy Act was clearly intended to deal with the property of the bankrupt, and not with that of third persons in his possession. Replevied property being without the scope of the section, it follows that the state court, when it obtains possession of the goods first, has the right to decide upon claims to their ownership. *In re Russell*, 101 Fed. 248. This view seems to be logically unassailable, and gives a satisfactory result, since the disputed title can best be determined in a plenary suit. Cf. 20 HARV. L. REV. 570.

CARRIERS — DISCRIMINATION AND OVERCHARGE — FREIGHT RATES QUOTED BY MISTAKE. — A state law provided that no railroad should make discriminating rates. The defendant, by mistake, quoted to the plaintiff a rate less than that regularly charged for like services. The plaintiff shipped the goods, but the defendant, discovering the mistake before delivery, exacted the full rate. The plaintiff brought an action for breach of the contract. *Held*, that the plaintiff cannot recover. *Haurigan v. Chicago and Northwestern R. R. Co.*, 117 N. W. 100 (Neb.).

Statutes prohibiting discrimination by common carriers are being very generally enacted, and the court in the principal case affirms the construction generally given to them. *Savannah, etc., R. Co. v. Bundich*, 94 Ga. 775; *Texas, etc., R. Co. v. Mugg*, 202 U. S. 242. The case in fact overrules a former decision, which was the only authority for the view that the contract was not void, as being illegal, if the railroad was acting under a mistaken belief in quoting a discriminating rate. *Mo. P. Ry. Co. v. Crowell, etc., Co.*, 51 Neb. 293. In the application of such statutes the intent of the contracting parties is immaterial. This is manifestly hard on the shippers, who may be induced to make shipments which they would not otherwise have made; but any other construction would defeat the purpose of the statute.

CONSTITUTIONAL LAW — ENFORCEMENT OF JUDGMENTS — JUDGMENT OF SISTER STATE ON ILLEGAL CONTRACT. — The defendant was associated with the plaintiff in certain transactions in cotton futures in Mississippi, which were illegal by the laws of that state. A controversy as to defendant's indebtedness under these transactions was submitted to arbitration and the award was given against the defendant. The defendant being temporarily in Missouri, the plaintiff brought an action there against him on the award, and obtained judgment. This judgment he sought to enforce in Mississippi. *Held*, that Mississippi must enforce the judgment. *Fauntleroy v. Lum*, 210 U. S. 230. See NOTES, p. 51.

CORPORATIONS — INSOLVENCY OF CORPORATION — RECEIVER'S CAPACITY IN SUIT AGAINST STOCKHOLDER. — A receiver of an insolvent corporation sued on an unpaid stock subscription note. In answer to the defendant's plea that the subscription was obtained by the fraud of the corporation, the receiver replied that certain creditors became such on the faith of the defendant's subscription. *Held*, that there can be no recovery. *Marion Trust Co. v. Blish*, 84 N. E. 814 (Ind., Sup. Ct.).

A receiver of a corporation, while representing the interests of both stockholders and creditors, takes his title under and through the corporation. For the purposes of litigation he stands in the shoes of the corporation. *Curtis v. Leavitt*, 15 N. Y. 1. Hence, though it is generally settled that a receiver may sue to recover unpaid stock subscriptions, the fraud of the corporation should rightly be a *prima facie* defence. *Gainey v. Gilson*, 149 Ind. 58. The one exception to the general doctrine that the receiver stands in no stronger position than the corporation, is that when the creditors have been defrauded, as in the misapplication or fraudulent disposition of corporate property, the receiver succeeds to their rights. *Alexander v. Relfe*, 74 Mo. 495. See *Curtis v. Leavitt*, *supra*. Even in such suits he must represent the rights, not of a few, but of the entire body of creditors. *American Trust, etc., Bank v. McGettigan*, 152 Ind. 582. Hence in the present case, even assuming that the specified defrauded creditors had rights against the defendant on the ground of estoppel, the receiver does not represent such special equities. See *Audenried v. Betteley*, 87 Mass. 382. The decision, therefore, seems correct.

CORPORATIONS — PROMOTERS — DISCLOSURE OF INTEREST TO DUMMY DIRECTORS. — The defendant and others, owners of certain parcels of property, formed a corporation, intending to sell to it at a profit in cash or shares, and offer stock for public subscription. When only forty shares had been issued, which were held by the defendant's dummies, the contract to buy the property was entered into by the corporation with the assent of all the shareholders. Two

months later one hundred and thirty thousand shares were issued to the vendors, and twenty thousand to outside subscribers. The corporation sued to rescind the sale of the defendant's parcel, or to recover his profits. *Held*, that the corporation, being bound by the assent originally given, has no remedy. *Old Dominion, etc., Co. v. Lewisohn*, 210 U. S. 206. See NOTES, p. 48.

CRIMINAL LAW — FORMER JEOPARDY — CONVICTION BY COURT MARTIAL AS BAR TO CRIMINAL PROSECUTION. — To an indictment for grand larceny the defendant pleaded former jeopardy. It appeared that he had been a member of the New York National Guard and had been tried by court martial on charges setting forth the same acts for which he was indicted. He had been found guilty and dismissed from the service. *Held*, that the plea is no bar to the prosecution. *People v. Wendel*, 37 N. Y. L. J. 797 (N. Y., App. Div., May, 1908).

An acquittal by a United States Army court martial will not bar an indictment in a state court; for the same act may constitute two offenses, — one against the United States, the other against the state. *State v. Rankin*, 4 Coldw. (Tenn.) 145. But a soldier acquitted of a charge of homicide by such a court martial cannot later be tried for the same act by a United States civil court. *Grafton v. U. S.*, 206 U. S. 333. There, however, the act was an offense against the United States alone, and, further, that court martial has jurisdiction and power to punish concurrent with the civil courts. *Ex parte Mason*, 105 U. S. 696. Trial by such a court martial may be said quite reasonably to constitute former jeopardy. But a New York court martial cannot inflict any punishment more serious than dismissal from the service and the imposition of a small fine. *N. Y. Military Code*, § 95. The defendant in the present case, then, had been formerly convicted of a breach of military discipline. But his acts were also a crime against the state, of which the state court martial had no jurisdiction. Clearly, therefore, he was never in jeopardy for it.

DAMAGES — CONSEQUENTIAL DAMAGES — DEVIATION OF ROUTE BY CARRIER. — The defendant railroad shipped the plaintiff's goods by a route different from that agreed upon, so that the plaintiff lost the benefit of a contract of sale, which provided that the sale could be avoided by the buyer if the goods arrived by other than a specified route. *Held*, that the plaintiff cannot recover for such loss. *St. Louis Southwestern Ry. Co. v. La. and Texas Lumber Co.*, 109 S. W. 1143 (Tex., Ct. Civ. App.).

When an action is brought upon the contract of carriage, the carrier's liability is limited to such damages as might reasonably be considered as arising from its breach, or such as might reasonably be supposed to have been in the contemplation of the parties when they made the contract. *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131. Under this rule the decision in the principal case is clearly correct if the action be considered as brought upon the contract. But the deviation might be treated as a conversion. *Phillips v. Brigham*, 26 Ga. 617. And in tort the damages which may be recovered are those which are the natural and proximate result of the unlawful act, even though not contemplated. *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342. But by the great weight of authority the loss of a contract, though resulting from the tort, is regarded as too remote a consequence to support a recovery of damages. *Seymour v. Ives*, 46 Conn. 109. Thus the result reached in the present case is sound, irrespective of the form of the action.

DECEIT — DAMAGES — MISREPRESENTATION OF TERMS OF INSURANCE. — The defendant's agent fraudulently represented to the plaintiff that his life insurance policies provided for insurance for a certain term and also for subsequent repayment of the premiums with interest. In fact the policies provided for no substantial benefits except upon death. The plaintiff accepted the policies and paid the premiums until the expiration of the term. He then brought an action of deceit against the defendant. *Held*, that the plaintiff may recover the amount of the premiums paid with interest. *Sykes v. Life Ins. Co. of Va.*, 61 S. E. 610 (N. C.).

The court reasoned that since the plaintiff might have obtained reformation

of the policies and specific performance of the contract, he was entitled to damages on such a basis. Probably reformation was an appropriate remedy. *Smith v. Jordan*, 13 Minn. 264. However, such was not the relief sought. The result reached follows the weight of authority and the prior decisions of the same court in holding that damages in an action of deceit are to be measured by the difference in value between what the plaintiff received and what he would have received had the representations been true. *Heddin v. Griffin*, 136 Mass. 229; *Lunn v. Shermer*, 93 N. C. 164. The minority, and seemingly the correct, view considers the plaintiff's loss and awards the difference in value between what he gave and what he received. *Smith v. Bolles*, 132 U. S. 125. In the principal case the plaintiff had received a benefit by way of insurance for ten years. His loss was therefore the difference between the value of this insurance and the amount paid in premiums. It is submitted that on principle the damages should have been so measured. See 14 HARV. L. REV. 454.

EQUITY — INJUNCTION — CRIMINAL PROCEEDINGS. — The plaintiff asked for an injunction to restrain the defendant, the Police Commissioner of New York City, from a threatened interference with his business for violation of the Sunday law. *Held*, that the injunction should be granted. *Eden Musee American Co. v. Bingham*, 125 N. Y. App. Div. 780.

For a discussion of the principles involved, see 14 HARV. L. REV. 293.

GIFTS — IMPERFECT GIFT — APPOINTMENT OF DONEE AS EXECUTRIX. — A expressed an intention to give his wife B some bonds, but died before the gift was completed, having appointed B his executrix. *Held*, that the imperfect gift is perfected by the vesting of the property in B as executrix, and that the intention to give the beneficial interest to B is sufficient to countervail the equity of the beneficiaries under the will. *Stewart v. McLaughlin*, [1908] 2 Ch. 251.

This decision, carried to its logical extension, would permit a testator to make a valid gift to his executor by merely telling him that he might on the testator's death take whatever personality he cared to. It is submitted that on principle this doctrine is wholly unsound. For the transaction here cannot take effect as a trust, since an intended gift, which has failed, cannot be converted into an unintended trust. *Richards v. Delbridge*, L. R. 18 Eq. 11. Nor can it be sustained as a gift *inter vivos*, for there was no delivery. *Allen-West Commission Co. v. Grumbles*, 129 Fed. 287. Nor is it to be supported as a testamentary disposition, since it lacks the formalities required by the Wills Act. And though upon the death of a testator the legal title is vested in the executor, nevertheless, it is held in a representative capacity, and a promise of a testator, though based upon a meritorious consideration, does not give rise to an equity which can be successfully interposed at the suit of a beneficiary. *Whitaker v. Whitaker*, 52 N. Y. 368.

INDICTMENT AND INFORMATION — FINDING AND FILING INDICTMENT — EXAMINATION OF ACCUSED BEFORE GRAND JURY. — The defendants were compelled to be sworn as witnesses before the grand jury, and to answer questions not incriminating themselves, but later they were indicted. *Held*, that the indictment should not be quashed. *U. S. v. Price*, 39 N. Y. L. J. 2167 (Circ. Ct., S. D. N. Y., Aug. 1908).

The defendant in a criminal case cannot be made to go upon the witness stand. *Low v. Mitchell*, 18 Mo. 372. A witness, whether a party or not, may not be compelled to give testimony incriminating himself. *Coburn v. Odell*, 30 N. H. 540. The question in the principal case is whether the defendant, when compelled to be sworn as a witness, was a party to a criminal case. The weight of authority holds that criminal proceedings are not instituted until a formal charge has been made against the accused. The examination of witnesses before the grand jury is no part of the criminal proceedings against the accused, but is merely to assist the grand jury in determining whether such proceedings shall be commenced. *Post v. U. S.*, 161 U. S. 583. Grand juries may seek information from persons conversant with the matter under investigation, and are not bound to exclude a person because it may happen ultimately that an indictment be found against him. *U. S. v. Kimball*, 117 Fed. 156. A re-

cent case to the contrary seems insupportable in that it confuses a witness's privilege with a party's rights. *People v. Gillette*, 39 N. Y. L. J. 1293 (N. Y., App. Div., June, 1908).

INJUNCTIONS — ACTS RESTRAINED — BALANCE OF CONVENIENCE DOCTRINE. — The defendant company constructed a system of sewage which extended on the plaintiff's land. The plaintiff prayed for an injunction to abate the nuisance caused by the discharge of sewage. *Held*, that the plaintiff is not entitled to an injunction. *Somerset Water, Light & Traction Co. v. Hyde*, 111 S. W. 1005 (Ky.).

The case follows numerous decisions which consider public convenience in the question of granting an injunction. *Valparaiso v. Hagen*, 153 Ind. 337. That this "balance of convenience" doctrine should be applicable to cases where the injury complained of is trivial seems reasonable. *Elliott v. Ferguson*, 103 S. W. 453 (Tex.). But its application in cases where the injury is substantial and the legal remedy admittedly inadequate seems as indefensible in principle as it is harsh in its results. The doctrine seems to rest upon two misconceptions of the extent of equitable power: the one, that the final settlement of property rights lies in a broad discretion of the chancellor and not in the clear legal and equitable rules which bind the chancellor himself; the other, that a court of equity may in effect condemn the property of an individual in the interest of the public, a power which the Constitution has placed in the legislature alone. *Sammons v. City of Gloversville*, 70 N. Y. Supp. 284; *Simmons v. Mayor, etc., of Paterson*, 60 N. J. Eq. 385. Further, the doctrine seems unwise in determining the standard of one person's right by the convenience of a particular public, or even, in its extension, by the necessities of another's business. *Lloyd v. Catlin Coal Co.*, 210 Ill. 460.

INJUNCTIONS — INTERFERENCE WITH CONTRACTS — TRADING STAMP BUSINESS. — The plaintiff sold non-transferable trading stamps, redeemable at its stores, to merchants, who gave them to customers as a premium upon cash purchases. The defendant, a rival concern, purchased from holders or exchanged for its own stamps large quantities of the plaintiff's stamps which they sold to brokers, redeemed in large lots, or resold to the plaintiff's subscribers at a low rate. The plaintiff prayed for an injunction restraining the defendant from such practice. *Held*, that the plaintiff is entitled to an injunction. *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 Fed. 219 (Circ. Ct., N. D. Ill.). See NOTES, p. 50.

JUDGMENTS — ESSENTIALS TO VALIDITY — WAIVER BY TESTATOR OF PERSONAL SERVICE ON EXECUTOR. — A, of Michigan, agreed with B, of Massachusetts, to submit a matter in dispute to arbitration under rule of court, the award to be binding on their executors in case of death. A died before the final award, and after notice by publication on A's executors judgment was given for B. *Held*, that the judgment is not binding on A's executors in Michigan. *Brown v. Fletcher*, 210 U. S. 82.

The "full faith and credit" clause of the Constitution does not prevent the court of a state in which the judgment of a sister state is presented from impeaching it for want of jurisdiction. *Thompson v. Whitman*, 18 Wall. (U. S.) 457. The test of jurisdiction is to be made at the time of verdict, not at the time of the commencement of the suit. Thus, jurisdiction over a citizen of another state is lost by his death, and it cannot be revived against his foreign executor, for personal service dies with the person. *Jones v. Jones*, 15 Tex. 463. A contract to waive personal service on oneself is probably good. See 15 HARV. L. REV. 746. But a contract to waive personal service on one's foreign executor has no effect. For a contract waiving appearance can give no greater right than actual appearance, and if an executor voluntarily submits to the jurisdiction of a foreign court, a judgment by that court is not binding on the estate, since an executor's representative character is a qualified one and cannot be extended beyond the jurisdiction of the court which created it. *Judy v. Kelley*, 11 Ill. 211.

LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW — EFFECT OF INTENT OF PARTIES. — The plaintiff was *cestui que trust* under a lease to his trustee. He took a new lease for a longer term, running directly to himself. The new lease was void. *Held*, that the original lease is not surrendered by operation of law. *Zick v. London United Tramways, Ltd.*, [1908] 2 K. B. 126. See NOTES, p. 55.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — SUIT BY CORPORATION. — The defendant said that the plaintiff, a business corporation, was "composed of a lot of fakirs, robbers, thieves, and business pirates, who are devoted to fraudulent practices, and take advantage of men when in their weakest position to extort money from them and give them absolutely nothing in return." *Held*, that the plaintiff cannot maintain an action for slander. *Hapgoods v. Crawford*, 125 N. Y. App. Div. 856.

For a discussion of the principles involved, see 21 HARV. L. REV. 60.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — INFORMATION SUPPLIED BY COMMERCIAL AGENCY. — Communications made in good faith by a commercial agency to a subscriber who had specifically requested them, contained statements defamatory of the plaintiff's character. *Held*, that such communications are not privileged. *Macintosh v. Dun*, [1908] A: C. 390.

Statements, though defamatory, are privileged if made by one who has a legal or moral duty to do so, to one who is interested in the subject matter. *Rothholz v. Dunkle*, 53 N. J. L. 438. So, a communication is privileged if made in answer to a proper inquiry. *Kine v. Sewell*, 3 M. & W. 297. The particular facts of the principal case come before the English courts for the first time, and the rule is departed from on the ground that public policy does not require protection of those who "trade in other people's character": competition, the court fears, will lead to malpractice in the collecting of information. This distinction is inconsistent with former decisions. The American courts recognize that modern business conditions demand that knowledge of the financial and personal trustworthiness of a firm be readily ascertainable, and they accordingly protect a commercial agency which has transmitted communications, confidentially and in good faith, to a customer having an interest in the subject matter. *Ormsby v. Douglass*, 37 N. Y. 477. Information, however, which is volunteered, such as a general report sent out to subscribers, is not privileged. *Douglass v. Daisley*, 114 Fed. 628.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — WHERE AND WHEN CAUSE OF ACTION ARISES. — The defendant executed promissory notes in Kansas payable in that state. Before they became due he removed to Washington, where he remained for the statutory period. He then went to Idaho, where suit was brought. An Idaho statute provided that "when a cause of action has arisen in another state, . . . and by the laws thereof an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state." *Held*, that the action lies against the defendant. *West v. Theis*, 96 Pac. 932 (Idaho).

The result in such cases depends on the interpretation of the clause "when a cause of action has arisen." It has been held that a cause of action cannot arise in the state where a debt is payable when the debtor is not personally within the jurisdiction. *Luce v. Clark*, 49 Minn. 356. But the better view is that in such a case, wherever the debtor may be, a cause of action arises. *Doughty v. Funk*, 15 Okl. 643. Hence a cause of action arose in Kansas when the notes matured. *Lawson v. Tripp*, 95 Pac. 520 (Utah). It has been held that a cause of action arises whenever the courts of a state have power to adjudicate upon the particular matter involved. *Hyman v. McVeigh*, 10 Chi. L. N. 157 (Ill.). According to this doctrine a cause of action arose in Washington, as well as in Kansas, and being barred in Washington was barred in Idaho. But this reasoning confuses "cause arising" with "right accruing" and seems unsound. *McKee v. Dodd*, 93 Pac. 854 (Cal.). There-

fore, since the action in Kansas was not barred — for the debtor was not in the jurisdiction — the case is correct. Moreover, it is supported by the weight of authority. *McCann v. Randall*, 147 Mass. 81.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — DELIVERY OF CHECK PAYABLE IN FUTURE. — More than six years prior to the bringing of suit the defendant delivered to the plaintiff a check in part payment of an old obligation. By agreement between the parties the check was not presented and paid until a day less than six years before the action was commenced. *Held*, that the plaintiff's claim is barred by the Statute of Limitations. *Marreco v. Richardson*, 24 T. L. R. 624 (Eng., Ct. App., May 15, 1908).

A voluntary part payment revives an obligation barred by the Statute of Limitations, on the reasoning that the transaction involves a recognition of the debt and a promise to discharge it. *Cleave v. Jones*, 6 Exch. 573. The court here holds that the promise must be implied as of the date of delivery of the check, following a decision that a bill of exchange drawn for future payment is evidence of a promise made at the date of drawing only. *Gowan v. Forster*, 3 B. & Ad. 507. *Cf. Turney v. Dodwell*, 3 E. & B. 136; *Smith v. Ryan*, 39 N. Y. Super. Ct. 489. It seems clear that if a new promise is anywhere to be found, it must be implied from some affirmative act of the debtor. Such an act is the transfer of the check; its payment, on the other hand, is an act of the bank. To imply that the promise involved in the delivery continues and is therefore repeated at the moment of payment, would be to draw an implication from another implication, and that without any equitable basis. In refusing to adopt such a fiction the court seems eminently sound.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — ORDINANCE RATIFYING UNAUTHORIZED ACT OF MAYOR. — Under its charter a city could change street grades only by ordinance. The defendant, who was mayor of the city, in pursuance of a resolution of the council, changed a street grade near the alley upon which the plaintiff's property abutted, rendering it inaccessible to vehicles. An ordinance authorizing the change was passed some time after. *Held*, that the defendant is liable for damage done previous to the passing of the ordinance. *Faust v. Pope*, 111 S. W. 878 (Mo.).

The plaintiff had a right to have the street kept open for the benefit of his property. *Longworth v. Sevedic*, 165 Mo. 221. Unless justified by the subsequent ordinance, the change in grade without proper authorization was a trespass for which the mayor is liable as an individual. *Reed v. Peck*, 163 Mo. 333. A municipal corporation has certain powers conferred upon it, which must be performed in the manner prescribed. *Cross v. Morristown*, 18 N. J. Eq. 305. Since grading could be authorized only by ordinance, any grading not so done was *ultra vires* and incapable of ratification; for otherwise the express power granted by charter would be disregarded. *Page v. Belvin*, 88 Va. 985. A recent decision which permits ratification may be distinguished on the ground that in it the city council was empowered to grade without the authorization of an ordinance. *Wolfe v. Pearson*, 114 N. C. 621. Even then the decision might be assailed on the ground that ratification should not be permitted when to do so would deprive a third party of a vested right of action. *Bird v. Brown*, 4 Exch. 786. The principal decision, then, seems clearly correct.

QUASI-CONTRACTS — MONEY PAID UNDER DURESS OR COMPULSION OF LAW — PAYMENT TO PUBLIC SERVICE CORPORATION. — The plaintiff with full knowledge of the facts, and without fraud on the defendant's part, voluntarily paid to the defendant telephone company an excessive charge. The plaintiff sued for the overpayment. *Held*, that the mere fact that the defendant is a public service corporation does not constitute such compulsion as to allow a recovery. *Illinois Glass Co. v. Chicago Telephone Co.*, 85 N. E. 300 (Ill.). See NOTES, p. 52.

REPLEVIN — STATUTORY REDELIVERY BOND — ACCIDENTAL DESTRUCTION OF PROPERTY BEFORE VERDICT. — The defendant, in an action of re-

plevin, executed a statutory redelivery bond and retained possession of the property. Through no fault of the defendant the property was destroyed by fire. The court then found the issues in the replevin suit for the plaintiff. *Held*, that the plaintiff is entitled to the full value of the property. *Bradley v. Campbell*, 111 S. W. 514 (Mo.).

The weight of authority supports this decision. *Hinkson v. Morison*, 47 Iowa 167; *George v. Hewlette*, 12 So. 855 (Miss.). *Contra, Pope v. Jenkins*, 30 Mo. 528. Opposing decisions are based on the rule that if the condition of a bond becomes impossible of performance by act of God, the penalty is saved. The application of this rule to a case like the present is specious, for it makes no distinction between the liability of a wrongdoer and that of a mere bailee. It is just that a bailee should be excused by the accidental destruction of the subject matter of the bailment. *U. S. v. Thomas*, 15 Wall. (U. S.) 337. But where there is a precedent wrong, and the obligor's liability does not rest wholly upon the contract, he should bear the loss of the property. The defendant in the principal case was a wrongdoer, for he was holding the plaintiff's property against the latter's will. He should not be allowed to keep such property at the owner's risk, for he has deprived him of the opportunity of disposing of it pending the litigation.

TAXATION — WHERE PROPERTY MAY BE TAXED — OPEN ACCOUNTS TAXED AT DEBTOR'S DOMICILE. — A Connecticut insurance company conducted business in Louisiana through an agent. The company extended no credit to its customers, but on delivery of each policy a debt arose from the agent to the company for the amount of the premium. *Held*, that the debt is taxable in Louisiana. *National Fire Ins. Co. v. Board of Assessors*, 46 So. 117 (La.).

This case is contrary to many early decisions in Louisiana, but follows the more recent trend of judicial decision in that state, and in others, to tax debts and *choses in action* at the domicile of the debtor. The court, by this decision, extends the doctrine for the first time in Louisiana to open accounts not represented by some tangible document. For a discussion of the principles involved, see 15 HARV. L. REV. 680; 20 *ibid.* 656.

TENANCY IN COMMON — PURCHASE BY ONE TENANT AT FORECLOSURE SALE OF COMMON PROPERTY. — After the death of a mortgagor of land the property was purchased by one of the heirs at the foreclosure sale. *Held*, that he holds the title free from any trust in favor of his co-heirs. *Jackson v. Baird*, 61 S. E. 632 (N. C.).

The case is opposed by virtually all American authority. *Savage v. Bradley*, 149 Ala. 169; *Moy v. Moy*, 89 Iowa 511. But on principle the decision seems unassailable. It is, indeed, established law in the United States that co-tenants stand in a fiduciary relation to one another, and that the purchase by one co-tenant of an encumbrance on the common estate inures to the benefit of all who elect to contribute their shares of the purchase price. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388. The basis of the doctrine is that it is inequitable for one co-tenant to obtain a title adverse to his fellows. In the principal case, however, the co-tenancy itself has ceased through the sale, and each has an equal chance to buy back. *Sutton v. Jenkins*, *supra*. And the case is clearly distinguishable from repurchase by a co-tenant at a tax sale, which revives the co-tenancy, on the general ground that purchase by any one under a legal duty to discharge the obligation to the state operates as a simple payment of the tax. *Delashmull v. Parrent*, 39 Kan. 548. The English doctrine that there is no fiduciary relation between co-tenants seems preferable. *Kennedy v. de Trafford*, [1897] A. C. 180. See 9 HARV. L. REV. 427.

TORTS — LIABILITY OF A COUNTY — INJURY TO PROPERTY RIGHTS. — A county employee, while repairing a road, negligently diverted a watercourse which destroyed the plaintiff's house. *Held*, that the county is liable. *Matsumura v. County of Hawaii*, 19 Haw. 18. See NOTES, p. 54.

VENDOR AND PURCHASER — REMEDIES OF PURCHASER — VENDEE'S LIEN AFTER RESCISSION. — After paying part of the purchase price on an executory

contract for the sale of land, the vendee sued for a rescission on the ground of fraud, and in the same action sued to recover the money paid and to establish and foreclose a lien on the land therefor. *Held*, that though the plaintiff is entitled to a rescission and the return of the money, the lien is lost by the rescission. *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128.

A vendee is generally allowed an equitable lien for money paid under an executory contract for the purchase of land. *Elterman v. Hyman*, 192 N. Y. 113; see 9 HARV. L. REV. 486. This lien is based, not on the contract, but, as in the case of a vendor's lien after conveyance, on the necessity of doing justice as between vendor and purchaser in the relation created by the contract. *Whitbread & Co., Ltd. v. Watt*, [1902] 1 Ch. 835. And since the lien affords to the vendee security for the purchase money paid before conveyance, the analogy to an equitable mortgagee's lien is very close. *Rose v. Watson*, 10 H. L. Cas. 672. The mere fact of rescission clearly does not destroy the equitable basis of this vendee's lien. Accordingly, the English and some American courts have definitely held that such a lien survives rescission. *Whitbread & Co., Ltd. v. Watt*, *supra*; *Galbraith v. Reeves*, 82 Tex. 357. Furthermore, as the very fact of suing to foreclose the lien would seem to constitute an election to rescind the contract, the many American courts which allow such suits after the vendor has failed to make a good title, apparently accept that doctrine. *Occidental Realty Co., v. Palmer*, 117 N. Y. App. Div. 505. The present case would therefore, both on principle and authority, seem unsound.

WAGERING CONTRACTS — RECOVERY OF MONEY LENT FOR GAMBLING. — The plaintiff lent money to the defendant's testator knowing that it might be used in gambling. The money was lent and so used in a jurisdiction where gambling was not illegal. *Held*, that the plaintiff may recover. *Saxby v. Fulton*, 24 T. L. R. 856 (Eng., K. B. D., July 27, 1908).

The English courts hold that the fact that money is lent for the express purpose of gambling will not defeat recovery if the contract is made and the money so used in a jurisdiction where gambling is not illegal. *Quarrier v. Colston*, 1 Phil. 147. The weight of American authority follows this doctrine. *Ward v. Vosburgh*, 31 Fed. 12. Opposing jurisdictions maintain that comity does not require a state to enforce contracts conflicting with its own conception of public policy. *Pope v. Hanke*, 155 Ill. 617. Conceding the soundness of the minority doctrine, the present holding would still seem correct, for the case must be distinguished from one wherein the loan is for the express purpose of gambling in a state where that practice is illegal. Money so lent cannot be recovered. *McKinnell v. Robinson*, 3 M. & W. 434; *Tyler v. Carlisle*, 79 Me. 210. But where the money is placed at the absolute disposal of the borrower, as in the principal case, the mere knowledge of the lender of the other's intention to use it in illegal gaming does not so render him *particeps criminis* as to defeat recovery. *Jackson v. Bank of Goshen*, 125 Ind. 347.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

EQUITABLE JURISDICTION OF NUISANCE. — In most of the United States it has been held that upon a bill to abate a nuisance, when the plaintiff's right or the defendant's wrong is disputed and doubtful, a permanent injunction will not issue unless the plaintiff has first obtained a judgment at law.¹ Whether or

¹ See 5 Pomeroy Eq. Jur., §§ 519 *et seq.* In England, New York, and California the statutes regulating procedure are construed to have abolished the rule. *Roskell v. Whitworth*, L. R. 5 Ch. 459; *Corning v. Troy Factory*, 40 N. Y. 191; *Lux v. Haggin*, 69 Cal. 255, 284.

not an equity judge to-day would consider himself bound by this rule of alleged expediency,² the definitive abolition of it would remove a pitfall from an important field of modern litigation, and is to be desired. Such is the conclusion reached by Professor William Draper Lewis, who has exhaustively set forth in a recent article what he believes to be the only possible, that is, the historical, explanation of the rule. *Injunctions against Nuisances and the Rule Requiring the Plaintiff to Establish His Right at Law*, 56 U. P. L. Rev. 290 (May, 1908). No explanation lies in the necessity of jury trial, inasmuch as equity decides difficult questions of fact in other kinds of injunction cases, as waste, unfair trade competition, trespass and interruption of easement when title is not disputed, and others; moreover, a feigned issue at law, or the statutory equivalent, may always be directed. Professor Lewis fastens the responsibility for the rule chiefly upon Lord Eldon,³ who stood at the end of a century in which the doctrine that no question of title to land could be tried except at law had become fixed.⁴ This prohibition extended to injunctions in support of easements, since these if allowed would usually decide the title to the land or the existence and extent of the title to the easement. On the other hand, no difficulty was felt in entertaining a bill to enjoin waste, because in such a case no question of title would probably be in issue. The mistake which the writer ascribes to Lord Eldon was that he classed bills to abate nuisance, which involve no question of title, with cases on easements instead of with those on waste. The confusion of nuisance with interruption of easement may be traced to the common law assize of nuisance, which lay for either tort, and to the consequent confused nomenclature. The rule, then, not only is useless in modern practice, but grew out of an ancient error of principle.

Some doubt, however, may be cast on the writer's contention that Lord Eldon erred when he applied the same rule of procedure to nuisances as to interruption of easements. Professor Lewis defines nuisance to be the interruption of the plaintiff's use of his property, not involving a trespass, and not actionable unless actually damaging; whereas interruption of easement involves interruption of possession, and is actionable without present damage: in the former class he would put the violation of a landowner's right to pure air, in the latter the violation of a riparian owner's right to pure water. But it does not appear that questions of title would more likely be raised by a bill to enjoin pollution of water than by one to protect air. Again, although the writer admits that the point is open, he indicates his view that a prescriptive right to commit a nuisance⁵ ought not to be countenanced. It is submitted, however, that if the contrary view should be taken, many suits to abate nuisance would present questions of title similar to those presented in the case of an easement claimed by prescription. Finally, at this date certainly the same practical considerations which move the writer to deprecate the rule as to nuisances should apply to the analogous rules governing trespass and easement cases where title is disputed; for the modern landowner probably values the mere title to his land no higher than his right to restrain interference with the enjoyment of it—he needs a common law action no more to protect the one than the other.

THE ADMINISTRATION OF INTERNATIONAL LAW BY STATE COURTS. — As international law comes to be more generally recognized as a complete, though perhaps not yet well defined, system of law, the question naturally presents itself as to how far the citizens of a state, as individual members of society, are to be bound by its precepts. Our courts have frequently decided that when it becomes necessary in the adjudication of a case they will take judicial cognizance of and apply the accepted principles which govern the family of nations.¹

² See Ames, Cas. Eq. Jur. 560 n.

³ Crowder v. Tinkler, 19 Ves. 617.

⁴ Pillsworth v. Hopton, 6 Ves. 51.

⁵ See 2 Wood on Nuisance, Ch. 20.

¹ Moultrie v. Hunt, 23 N. Y. 394, 396.

This being so, it has been asserted that international law has been judicially established to be law in the same sense that national law is, and that it constitutes an integral part of the municipal law of England and of the United States.² The soundness of this conclusion is questioned in a recent article. *The Legal Nature of International Law*, by W. W. Willoughby, 2 Am. J. of Int. L. 356 (April, 1908). The author admits as true the statement that our courts will and constantly do adopt and apply established principles of international law; but not, he says, before these principles have first been impliedly adopted by the English or American state as a portion of its municipal law. These principles, the product of international usage and agreement, derive their legal force, when applied in the courts, from the sanction of the state whose laws the court administers. But the apparent conflict of opinion between Mr. Willoughby and Dr. Scott, when reduced to its lowest terms, seems to resolve itself into a matter of phraseology.

When any number of persons associate themselves in one political unit, they must necessarily adopt a law, conceived of as an entity. For "a state is a body of free persons united together for the common benefit, to enjoy peaceably what is their own, and to do justice to others."³ But that assumes the existence of rights. Rights are created by law, and without law there can be no rights; so that the creators of the state in assuming that rights exist, must necessarily adopt, directly or impliedly, a law from which those rights spring. Having adopted law, as yet undefined and perhaps unknown, unless embodied in a statute, the state creates courts of justice into which all men may bring their disputes for settlement; and it is the duty of the judges to discover the law of the case, that is, to apply that part of law which has created the rights and through them the wrongs of the litigants. These decisions are evidence of the law.⁴ By this process have our several states adopted non-statutory common-law principles, and in like manner, Mr. Willoughby says, the principles of international law have been adopted into the law of the state: "thus, in fact, these principles are recognized and enforced, not as international law, but as municipal law." This must in fact be so; for the courts of any state administer only one system of law, comprising many branches, such as contracts, torts, and international law.

It seems difficult to find any real point of difference between the author's conclusions and those reached by Dr. Scott, which he purports to refute. The two seem to uphold, perhaps in different words, the same and, as it undoubtedly seems, the correct view.

AMENDMENTS TO THE CODE OF CIVIL PROCEDURE IN 1908. *Anon.* Citing recent decisions affecting the law in New York. 14 Bench & Bar 51.

AMERICAN THEORY OF INTERNATIONAL ARBITRATION, THE. *Anon.* Comparing the arbitration treaties of 1904 with those of 1908. 2 Am. J. of Int. L. 387.

ASSIGNABILITY OF LIFE INSURANCE POLICY TO ONE PAYING THE PREMIUM. *Edwin Maxey.* 20 Green Bag 232.

BOMBARDMENT BY NAVAL FORCES. *James Brown Scott.* A thorough treatment of the authorities and of the declarations of the Hague conferences on the subject. 2 Am. J. of Int. L. 285.

BURGERMEISTER, GERMANY'S CHIEF MUNICIPAL MAGISTRATE, THE. *Joseph Torrey Bishop.* 2 Am. Pol. Sci. Rev. 396.

CHANGE OF THE PROPERTY IN GOODS BY SALE IN MARKET OVERT, THE. *J. G. Pease.* Origin and history of law as to Market Overt. 8 Colum. L. Rev. 375.

CHARACTER OF GOVERNMENT DEPENDS UPON ITS LEGAL PROCEDURE. *W. T. Hughes.* Maintaining that radical changes in legal procedure are unwise. 3 Ill. L. Rev. 24.

CHILDREN'S COURTS. *J. J. Kelso.* A discussion of methods and results. 28 Can. L. T. 163.

² The Legal Nature of International Law, by James Brown Scott, in 1 Am. J. of Int. L. 831.

³ *Chisholm v. Georgia*, 2 Dall (U. S.) 419, 455.

⁴ 1 Bl. Comm. 68; *Swift v. Tyson*, 16 Pet. (U. S.) 1, 18.

- CLAIM OF A FEDERAL RIGHT TO ENFORCE IN ONE STATE THE DEATH STATUTE OF ANOTHER, THE. *Henry Schofield*. 3 Ill. L. Rev. 65.
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- CORPORATION IN THE STREET, THE. *Charles L. Dibble*. Pointing out the modern tendency towards granting wider privileges in the use of streets and exacting greater remuneration. 6 Mich. L. Rev. 624.
- COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, THE. *W. A. Purrington*. A discussion of this court's work and usefulness. 13 Bench & Bar 12.
- DARTMOUTH COLLEGE CASE, THE. *Robert Sprague Hall*. Arguing that the scope of the decision should be limited to educational institutions. 20 Green Bag 244.
- DOCTRINE OF THE LIABILITY OF THE MASTER FOR THE TORTS OF HIS SERVANT, AND ITS ANOMALIES IN ILLINOIS, THE. *Charles Lederer*. Submitting that public policy is the basis of the master's liability. 2 Ill. L. Rev. 553.
- EFFECT OF A GRANT OF LAND AND THE REFORM OF REAL PROPERTY LAW. *T. Cyprian Williams*. A discussion of the effect of a mortgage deed on seisin. 52 Sol. J. 527.
- EFFECT OF A GRANT OF LAND BY WAY OF MORTGAGE. *T. Cyprian Williams*. Arguing that by a mortgage deed the mortgagee becomes seised in fee without taking possession. 52 Sol. J. 510.
- EVOLUTION OF THE ENGLISH JOINT STOCK LIMITED TRADING COMPANY, THE. *Frank Evans*. 8 Colum. L. Rev. 339.
- EXECUTION OF SEALED INSTRUMENTS BY AN AGENT, THE. *Floyd R. Mechem*. 6 Mich. L. Rev. 552.
- EXTRATERRITORIAL ENFORCEMENT OF STATUTES IMPOSING DOUBLE LIABILITY UPON STOCKHOLDERS, THE. *Arthur K. Kuhn*. 17 Yale L. J. 457.
- IMPORTANCE OF THE LAST WILL AND TESTAMENT, THE. *Virgil M. Harris*. 41 Chi. Leg. N. 23.
- INCOME OF UNCONVERTED REAL ESTATE, THE. *Anon.* 52 Sol. J. 657.
- INJUNCTIONS AGAINST NUISANCES AND THE RULE REQUIRING THE PLAINTIFF TO ESTABLISH HIS RIGHT AT LAW. *William Draper Lewis*. 56 U. P. L. Rev. 289. See *supra*.
- INJUNCTION PLANK, THE. *Charles C. Moore*. Urging trial by jury in certain cases of contempt. 12 L. N. (Northport) 87.
- INTERNATIONAL BANKING, OR FOREIGN EXCHANGE AND INCORPORATED BANKS. *William G. Bliss*. A discussion of some of the difficulties encountered by banks in this important branch of banking. 25 Bank. L. J. 545.
- INVASION BY EXPRESS COMPANIES, AN. *Nathan B. Williams*. Maintaining that express companies have wrongly been allowed to carry mailable matter. 16 Am. Lawyer 260.
- IS THE RENVOI A PART OF THE COMMON LAW? *Edwin H. Abbot, Jr.* 24 L. Quar. Rev. 133.
- JUDICIAL ASPECTS OF THE PEACE MOVEMENT. *Hayne Davis*. The Hague Arbitration Tribunal. 16 Am. Lawyer 210.
- JURISDICTION IN SALVAGE CASES. *James D. Dewell, Jr.* Arguing that in certain cases there is common law jurisdiction. 17 Yale L. J. 513.
- LABOR ORGANIZATIONS IN LEGISLATION. *Jerome C. Knowlton*. A criticism of recent decisions and statutes in regard to labor organizations. 6 Mich. L. Rev. 609.
- LAW OF IMPEACHMENT IN THE UNITED STATES, THE. *David Y. Thomas*. 2 Am. Pol. Sci. Rev. 378.
- LAW RELATING TO MONEYLENDERS AND MONEYLENDING, THE. *Eric G. Floyd*. A discussion of the English law on the subject. 30 L. Stud. J. 158.
- LAW TEACHER: HIS FUNCTIONS AND RESPONSIBILITIES, THE. *H. B. Hutchins*. 8 Colum. L. Rev. 362.
- LEGAL NATURE OF INTERNATIONAL LAW, THE. *W. W. Willoughby*. Maintaining that to be binding on a nation each rule of International Law must be adopted by the nation. 2 Am. J. of Int. L. 357. See *supra*.
- LIABILITY FOR MISREPRESENTATION. *Geo. S. Holmsted*. 44 Can. L. J. 513.
- LIMITED PARTNERSHIP IN AMERICA AND ENGLAND. *Francis M. Burdick*. A comparison of the law in the two countries. 6 Mich. L. Rev. 525.
- LIST OF LEGAL NOVELS, A. *John H. Wigmore*. A classification and discussion of novels containing legal characters or episodes. 2 Ill. L. Rev. 574.
- MEANING OF COASTING-TRADE IN COMMERCIAL TREATIES. *L. Oppenheim*. Emphasizing the need of a clearer definition of the term Coasting Trade. 24 L. Quar. Rev. 328.

- MODERN DIALOGUE BETWEEN DOCTOR AND STUDENT ON THE DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS. *Albert Martin Kales*. 24 L. Quar. Rev. 301.
- MORAL DUTY TO AID OTHERS AS A BASIS OF TORT LIABILITY, THE. II. *Francis H. Bolen*. 56 U. P. L. Rev. 316.
- MUNICIPAL GOVERNMENT BY COMMISSION. *W. H. Moore*. Maintaining that municipal government reform is preferable to government by commission. 28 Can. L. T. & Rev. 336.
- NEGLIGENCE UNDER THE EMPLOYERS' LIABILITY ACT. *Raymond D. Thurber*. A discussion of the law in New York. 13 Bench & Bar 17.
- NEW FEDERAL EMPLOYERS' LIABILITY ACT, THE. *Theodor Megaarden*. Comparing text of act of 1908 with that of act of 1906. 12 L. N. (Northport) 44. See 22 HARV. L. REV. 38.
- OKLAHOMA CONSTITUTION, THE. *John Bell Sanborn*. 42 Am. L. Rev. 362; 31 N. J. L. J. 196.
- PASS-BOOK AND FORGERY. *W. F. Chipman*. Discussing whether a depositor's failure to notify bank of its acceptance of forged cheque absolves the bank from liability. 28 Can. L. T. 527.
- PRESENT PRACTICE WITH RESPECT TO DEFECTIVE TRANSFERS OF STOCK OR SHARES. *N. G. Pilcher*. Pointing out the confusion of present conditions. 5 Com. L. Rev. 152.
- PREVENTION OF CRIME, THE. *Marcus Dods*. Advocating indeterminate sentences. 20 Jurid. Rev. 160.
- PROBLEM IN THE ILLINOIS LAW OF DESCENT, A. *Albert M. Kales*. 3 Ill. L. Rev. 74.
- RECENT EUROPEAN LEGISLATION WITH REGARD TO COMPENSATION FOR INDUSTRIAL ACCIDENTS. *Kenelm E. Digby*. 17 Yale L. J. 485.
- SANCTION OF INTERNATIONAL LAW, THE. *Elihu Root*. Maintaining that international law is based on public opinion. 2 Am. J. of Int. L. 451; 53 Ohio L. Bul. 332.
- SCIENCE OF INTERNATIONAL LAW, THE: ITS TASK AND METHOD. *L. Oppenheim*. 2 Am. J. of Int. L. 313.
- SCIENTIFIC ASPECT OF DUE PROCESS OF LAW AND CONSTRUCTIVE CRIMES, THE. *Theodore Schroeder*. Arguing that too much attention may be paid to judicial decisions and too little to justice. 42 Am. L. Rev. 369.
- SPECIFICATION OF THE ABUSES OF THE CONTINGENT FEE, A. From the report of the Committee on Contingent Fees of the New York State Bar Association. 12 L. N. (Northport) 68.
- STATUS OF ENEMY MERCHANT SHIPS. *James Brown Scott*. 2 Am. J. of Int. L. 259.
- SUBSTITUTE FOR A CENTRAL BANK, A. *Newton D. Alling*. Maintaining that a central bank is neither necessary nor desirable. 25 Bank. L. J. 251.
- UNIFORM LAWS BY INTERSTATE COMPACT. *Ben W. Jonnson*. 6 Oh. L. Rep. 208.
- UNION LABELS. *W. A. Martin*. A discussion of what protection from infringement should be accorded union labels. 42 Am. L. Rev. 511.
- USE OF SUBMARINE MINES AND TORPEDOES IN TIME OF WAR, THE. *C. H. Stockton*. A discussion of the rules adopted at the Hague Conference. 2 Am. J. of Int. L. 276.
- WHAT CONSTITUTES THE "END" OF A WILL. *Anon.* 53 Oh. L. Bull. 137.
- WHAT PERSONS ARE WITHIN THE PURVIEW OF STATUTES AFFECTING THE ENFORCEMENT OF CLAIMS FOR SERVICES. *C. B. Labatt*. 44 Can. L. J. 369.
- WRIT OF HABEAS CORPUS, THE. *Clarence C. Crawford*. An historical treatment of the subject. 42 Am. L. Rev. 481; 125 L. T. 400, 420.

II. BOOK REVIEWS.

THE LAW OF TORTS. By John W. Salmond. London: Stevens and Haynes. 1907. pp. xxviii, 507. 8vo.

The writer of this work is a New Zealand barrister, formerly a Professor of Law in the University of Adelaide, South Australia, and already favorably known as an author through his treatise on Jurisprudence, previously noticed in these pages.¹

¹ 16 HARV. L. REV. 315.

This work on Torts is worthy to be placed on the same shelf with Pollock or Clerk & Lindsell. It has the great merits of condensation and clearness, — two qualities which are apt to go together. The author has done his own thinking, and, as a general rule, has expressed his thoughts in his own words. But there is no striving after new or odd ways of "putting things," no love of novelty for its own sake. No difficulties are evaded. Indeed, the author does not content himself with examining questions which have already come before the English courts. He anticipates and discusses questions which are likely to arise. It is interesting to note that in at least two instances his prophecies accord with decisions given in the United States.

Mr. Salmond follows up his general statements and definitions with specific applications and illustrations, so carefully framed that little room is left for misapprehension as to the meaning of his general propositions. A good example is found in his examination of the respective functions of the judge and jury in relation to the question of probable cause in actions for malicious prosecution (pp. 460-461), and also as to proof of negligence (pp. 26-28).

For instances of clearness and condensation reference may be made to a paragraph of ten lines on the question whether a father may be held liable for the torts of his children (p. 60); a single page on "Lunacy as a Defence in an Action of Tort" (p. 61); and five pages discussing all the considerations which must be taken into account in determining when a civil action for damages can be maintained for a breach of statutory duties (pp. 472-477).

Under the head of "The Rule in *Davies v. Mann*" there is a valuable discussion as to the necessity of showing, in order to hold a defendant, that he "either knew or ought to have known of the danger created by the prior negligence of the plaintiff." Whether one agrees or disagrees with the author's results as to various of his illustrations on pages 39 and 40, it must be admitted that those illustrations present vital problems.

While Mr. Salmond does not hesitate to criticise some established doctrines, he takes care to state distinctly what the existing law is before he considers what it ought to be. See, for example, p. 416.

A few scattered extracts may give some idea of his general style:

"In the proposition that an action of deceit will lie only for a statement of fact, the term fact is used to include everything except a promise" (p. 419).

"... wager of law, a form of licensed perjury which reduced to impotence all proceedings in which it was allowable" (p. 286).

As to judgment in trover for the value of the goods, followed by satisfaction: "It is in effect a compulsory purchase of the goods by the defendant" (p. 329).

"Mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. This is the anomalous rule established by the House of Lords in the leading case of *Derry v. Peek*. Although in almost all other forms of human action a man is bound to take reasonable care not to do harm to others, this duty does not extend to the making of statements on which other persons are intended to act" (pp. 419, 420).¹

"It is sometimes said that a person is presumed in law to intend the natural and probable results of his acts. . . . Such a form of statement, however, is useless and misleading. So far as it is true at all, it is simply an improper way of saying that a person is responsible for the natural and probable consequences of his acts, whether he intended them or not" (p. 104, note 3).

In classification and nomenclature the author generally follows ordinary usage, but some exceptions may be noted:

(1) At the close of the book he has a chapter entitled "Residuary Forms of Injury," a sort of sink into which are thrown the sub-titles which did not fit in under any of the ordinary leading divisions.

(2) He has inserted as a separate title "Injurious Falsehood," which he carefully distinguishes from deceit on the one hand and defamation on the

¹ Cf. Pollock, Torts, 8 ed., 293, note a; Bigelow, Torts, 7 ed., 68, 69; 14 HARV. L. REV. 184.

other (see pp. 417, 382, 426). It is apparent that some specific title of this sort must be introduced into the law, unless Mr. Bishop's class of "Unnamed Wrongs" is to cover a very wide field.

(3) As to assault, battery, and kindred topics.

Here are two difficulties. One is, that the terms "assault" and "battery" are often used interchangeably. What is strictly assault is denominated battery, and *vice versa*: and this results in confusion of legal ideas. The other is, that there are actionable violations of the right of personal immunity which do not fall within the ordinary legal definitions of either assault or battery.

Mr. Salmond meets these difficulties: first, by using one term "assault" to cover all the kinds of injuries heretofore classified separately as assaults or as batteries; and, second, by introducing a new title, "Bodily Harm" (pp. 337-349). Under the latter title he includes (*inter alia*) physical harm inflicted negligently, and "illness due to mere nervous shock." Under the former title he begins by defining assault in language heretofore generally used to describe battery; viz., "the intentional application of force to the person of another without lawful justification." Then the species of actionable tort heretofore generally defined as assault he virtually describes as an attempt to commit an assault; using "assault" in the sense of his own previous definition. Mr. Bishop once suggested the possibility of using battery, not assault, as the one general term in criminal law. His plan was: Define battery according to the old usage; then define assault as "any indictable attempt to commit a battery."¹

Probably no two lawyers would agree on all questions in the law of torts. From our standpoint some of Mr. Salmond's views are disputable. We should not concur in his criticism of *Fouldes v. Willoughby* (p. 293, note 25). We should differ widely from him as to Legal Cause, a topic which he treats of (pp. 103 *et seq.*) under the head of Remoteness of Damage, and upon which he is supported by the high authority of Sir Frederick Pollock. But his discussions, even though they may not invariably convince the reader, are always thoughtful and stimulating.

J. S.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. In about 20 volumes. Vol. I: Action to Bankers and Banking. London: Butterworth & Co. Philadelphia: Cromarty Law Book Company. 1907. pp. ccxviii, 647 (68). 8vo. Vol. II: Bankruptcy to Bills of Exchange. 1908. pp. clviii, 580 (54).

The projectors of this *magnum opus* describe it on the titlepage as "A complete statement of the whole Law of England." The work is not an encyclopedia, after the manner of the English Encyclopedia of Law or the American and English Encyclopedia of Law. In the former there are one hundred and forty-two principal articles, and in the latter seventy-six articles, under the letter A and the letter B as far as the title Bills of Exchange, whereas in the first two volumes of Lord Halsbury's work there are but seventeen articles. Nor is this work a digest of the law arranged upon a scientific classification of the branches of the law. This "complete statement" of the law is to be contained in a collection of treatises, arranged alphabetically, upon the main divisions of the law. Volume I deals with Action, Admiralty, Agency, Agriculture, Aliens, Allotments, Animals, Arbitration, Auction, Bailment, and Bankers and Banking. Vol. II contains but four treatises, upon Bankruptcy and Insolvency (355 pages); Barristers (67 pages); Bastardy (28 pages); and Bills of Exchange, Promissory Notes and Negotiable Instruments (124 pages).

In the execution of this novel and comprehensive plan excellent judgment has been exercised in the selection, as writers of the treatises, of men who have already made their mark as authors, or as expert practitioners, in special branches of the law.

¹ 2 Bishop, New Crim. Law, §. 23, note 1.

An enlightening and carefully prepared Table of Contents precedes each treatise, and each volume contains a Table of Statutes and a Table of Cases cited.

If the excellence of these two volumes is maintained in the subsequent volumes, the complete work will be a solid contribution to the Law of England, and of great practical utility to the lawyer and the judge.

J. B. A.

HANDBOOK OF THE LAW OF SALES. By Francis B. Tiffany. Second Edition. Hornbook Series. St. Paul: West Publishing Co. 1908. pp. x, 435. 8vo.

Of the excellence of this book as a concise presentation of the general principles of the law of sales sufficient was said in the review of the first edition. See 9 HARV. L. REV. 228. It is essentially a summary of what the law is, with almost no explanation or elucidation of principles. Frequent reference is made to the more extended discussions in Benjamin and other works. In this second edition several of the chapters have been partly rewritten to advantage. For example, in the chapters on the "Effect of the Contract in Passing the Property," the author makes the distinction, which was not brought out clearly in the first edition, between the passing of title and the right to possession where goods are delivered to a carrier by the seller. Much new matter has been introduced in the chapters on warranties, but with the limited space at command the author can do little more than state general rules. These additions, with the many new cases cited, make the book more useful.

In the appendix the proposed Sales Act, drawn by Professor Samuel Williston of Harvard University, is printed. This act, which was recommended by the Commissioners on Uniform State Laws, has already been enacted in several states, so that a study of it is no longer academic. The author has adopted its text freely in stating general rules, and has made frequent reference to its sections in the notes, as well as to the sections of the English Sale of Goods Act, which is also printed in the appendix. The points wherein the Sales Act is different from the common law are noted. This treatment gives a present value and interest to the book, for the reader becomes familiar with an act which is likely to be adopted generally. For a thorough study of the act, however, the reader is referred to the annotated draft which is published elsewhere. See 30 Rep. Am. Bar Ass'n, 343 *et seq.* (1906).

R. T. H.

TWO STUDIES IN INTERNATIONAL LAW. By Coleman Phillipson. London: Stevens and Haynes. 1908. pp. xviii, 136. 8vo.

The two studies contained in this small volume are entitled "The Influence of International Arbitration on the Development of International Law" and "The Rights of Neutrals and Belligerents as to Submarine Cables, Wireless Telegraphy, and Intercepting of Information in Time of War." Mr. Phillipson's work shows evidence of considerable industry. Each study is preceded by a fair-sized bibliography. The first study contains many facts and instances, and is compressed in a very small compass. The author's own opinion as to the influence of international arbitration is not given with any fulness. We regret that he has failed to do this when we read the second study, for in that, after a very thorough presentation of the opinions of other writers and of the various Institutes of international law, a statement of treaty provisions and of actual cases in time of war, Mr. Phillipson sums up what he considers the law is, and what it is tending to become. The opinions which he reaches are not only well founded in themselves, but are substantially those reached by the Institut de Droit International in Ghent (pp. 110-113) some time after the writing of his essay.

Though in no sense a complete work, this little book is suggestive, and is convenient both as a reference manual and as a means of getting at more detailed consideration of the two interesting subjects which are dealt with. S. H. E. F.

THE MASSACHUSETTS BUSINESS CORPORATION LAW OF 1903. By Prescott F. Hall. Second Edition. Boston: William J. Nagel. 1908. pp. xcv, 631. 8vo.

A review of the first edition of this book may be found in 17 *HARV. L. REV.* 215. The volume in hand is much larger than its predecessor, the increased size being principally due to a much fuller exposition and citation of authorities, as a result of which the book is so greatly changed that it is almost a new work. A chapter on promotion is added. The discussion of the corporation law as it appeared in *The Massachusetts Revised Laws* is omitted as a separate subject, but under each section of the present act the author discusses the history and former constructions of the provisions under examination, as well as their present force.

As the title indicates, the discussion is limited to corporations under the Act of 1903, which does not include within its scope corporations carrying on within the Commonwealth a banking, insurance or public service business. There is no attempt to analyze or even set forth as such the principles of the common law concerning corporations. The treatment consists of a statement, and an apparently exhaustive and accurate citation, of the Massachusetts decisions, together with a few leading cases in other jurisdictions. There is little attempt at analysis even of these Massachusetts cases.

The volume is then really a digest of Massachusetts corporation law, case and statutory, and as such few faults can be found with it. The mechanical features are creditable; the usual table of cases is supplemented by a valuable table of statutes showing at what page or pages each is mentioned; and the general index is especially complete and praiseworthy. The rather extended set of forms, official and, mostly, unofficial, will doubtless be convenient.

A. R. G.

TRUE STORIES OF CRIME. By Arthur Train. New York: Charles Scribner's Sons. 1908. pp. xii, 406. 8vo.

This volume contains thirteen short stories, each giving an account of an actual criminal case which came to the attention of the staff of the District Attorney's Office in New York City. A few of the cases, like the story of Abraham H. Hummel's connection with the Dodge Case, and the murder of William M. Rice, are, no doubt, familiar to the general reader, but even these are set forth in a light and easy style that will interest and entertain. The author has aimed to write stories for the public, not to present a study of our methods of criminal prosecution. He retains his point of view of an assistant district attorney in order to present the facts as he knew them, but he is interested in the lively hardships of the victims of the criminals and in the human side of the criminals themselves.

P. K.

ON THE WITNESS STAND. By Hugo Münsterberg. New York: The McClure Co. 1908. pp. 269. 8vo.

Prof. Münsterberg is an ardent believer in applied psychology. He shows how psychology has already been applied to many fields of practical life, notably medicine, art, education, and economics, and then argues it should be applied to law also. The elaboration of that thesis is the content of this series of essays. He confines himself, however, mainly to the consideration of the acquisition of evidence. He has written these essays avowedly in a style that will appeal to the public at large, for he believes that the pressure of public opinion is necessary to induce the conservative legal profession to adopt the suggested reforms. Frequent reference by way of illustration to experiments by himself and others adds to the interest of the book.

While developing cleverly the necessity of taking into account what may be roughly termed the personal equation of the witness, and outlining possible methods, Professor Münsterberg has too much neglected the fact that the law

must deal practically with questions and that its delays are already proverbial. Moreover the application of his suggestions would multiply the issues of a case, and cloud the main one in a way which experience in jury trials has shown to be unwise.

E. H. G.

- WATER RIGHTS IN THE WESTERN STATES. By Samuel C. Wiel. Second Edition, Revised. San Francisco: Bancroft-Whitney Company. 1908. pp. lxi, 974. 8vo.
- MINING LAW AND LAND OFFICE PROCEDURE. By Theodore Martin. San Francisco: Bender-Moss Company. 1908. pp. lxi, 980. 8vo.
- THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES. By Robert T. Devlin. San Francisco: Bancroft-Whitney Company. 1908. pp. lxx, 864. 8vo.
- THE NEGOTIABLE INSTRUMENTS LAW: THE FULL TEXT OF THE LAW WITH ANNOTATIONS. By John J. Crawford. Third Edition. New York: Baker, Voorhis and Company. 1908. pp. xlviii, 212. 8vo.
- THE LAW OF WAR ON LAND. By Thomas Erskine Holland. Oxford: At the Clarendon Press. London and New York: Henry Frowde. 1908. pp. viii, 149. 8vo.
- THE LAW OF TENDER. By George Lucas Benyon Harris. London: Butterworth & Company. 1908. pp. lxx, 374 (41). 8vo.
- THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATIONS TO CRIMINAL PROCEDURE. By Maurice Parmelee. New York: The Macmillan Company. 1908. pp. viii, 410.
- THE JUSTICE OF THE MEXICAN WAR. By Charles H. Owen. New York and London: G. P. Putnam's Sons. 1908. pp. viii, 291. 8vo.
- POWERS OF THE AMERICAN PEOPLE. By Masuji Miyakawa. Second Edition. New York: The Baker and Taylor Company. 1908. pp. xiv, 431. 8vo.
- A DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks. Book II, Part III. LAW OF QUASI-CONTRACT AND TORT. By J. C. Miles. London: Butterworth and Company. 1908. pp. xvi, 429 (7). 8vo.
- THE EXTINCTION IN PERPETUITY OF ARMAMENTS AND WAR. By Albert William Aldeson. London: P. S. King and Son. 1908. pp. 213. 8vo.
- THE ELEMENTS OF INTERNATIONAL LAW. By George D. Davis. Third Edition, Revised. New York and London: Harper & Brothers. 1908. pp. xxx, 673. 8vo.
- THE MASSACHUSETTS LAW OF LANDLORD AND TENANT. By Prescott F. Hall. Second Edition. Boston: Little, Brown & Company. 1908. pp. lxii, 619. 8vo.
- THE SCIENCE OF JURISPRUDENCE. By Hannis Taylor. New York: The Macmillan Company. 1908. pp. lxx, 676. 8vo.
- A TREATISE ON FACTS: OR, THE WEIGHT AND VALUE OF EVIDENCE. By Charles C. Moore. In two volumes. Northport, Long Island, New York: Edward Thompson Company. 1908. pp. clxvii, 730, 731-1612. 8vo.
- INTERNATIONAL LAW. PART II. WAR. By John Westlake. Cambridge: At the University Press; New York: G. P. Putnam's Sons. 1907. pp. xvi, 334. 8vo.
- INTERNATIONAL LAW APPLIED TO THE RUSSO-JAPANESE WAR. By Sakuyé Takahashi. American Edition. New York: The Banks Law Publishing Company. 1908. pp. xviii, 805. 8vo.
- THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By Frederick H. Cooke. New York: Baker, Voorhis and Company. 1908. pp. xcii, 302. 8vo.
- THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXIII. For the year 1908. Select Cases Concerning the Law Merchant. A.D. 1270-1638. Volume I. Edited for the Selden Society by Charles Gross. London: Bernard Quaritch. 1908. pp. lv, 181. 4to.

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IGNORANCE AND MISTAKE IN THE CRIMINAL LAW.

I.

IN the early days of English jurisprudence, maxims were regarded as inflexible and comprehensive rules of law to be strictly applied without regard to the reasons upon which they were based.¹ Modern courts and text-writers, however, attach much less importance to maxims;² for the experience of centuries has proved the inapplicability of maxims in many instances and their too extensive scope in others. As pointed out in an article by Professor Jeremiah Smith,³ there is much necessary difficulty in applying a maxim on account of its brevity and the fact that it is couched in a foreign language. Moreover, there is nothing in a maxim to indicate when it is to be applied. Although maxims vary in value and force,⁴ they may in most instances be regarded as but trite and brief statements of legal principles, which principles have become established by reason and custom. Difficulty arises when the maxim is treated as the principle rather than the statement of the principle. The degree of accuracy with which

¹ "The fourth ground of the law of England standeth in divers principles that be called in the law *maxims*, the which have been always taken for law in this realm; so that it is not lawful for any that is learned to deny them; for every one of those maxims is sufficient authority to himself." Doc. & Stud., Dial. I, c. 8.

"A maxime is a proposition to be of all men confessed and granted without prooffe, argument, or discourse." Co. Lit. 67 a.

² "It seems to me that legal maxims in general are little more than pert headings of chapters." 2 Stephen, Hist. Crim. Law, 94, note 1.

"I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Lord Esher, M. R. in *Yarmouth v. France*, 19 Q. B. D. 647, 653.

³ 9 HARV. L. REV. 13.

⁴ *Ibid.*

the statement fits the principle determines the value of the maxim. Consequently, when a body of law has grown up around a maxim, it is desirable to ascertain the extent to which the decisions are based upon legal reasoning and analogy, and the extent to which they have been influenced by the maxim as such.

*Ignorantia juris non excusat, ignorantia facti excusat*¹ is a maxim familiar to the layman as well as to the lawyer. The purpose of this article is to discuss the origin of this maxim; to consider the scope of its influence in criminal jurisprudence;² to discover the extent to which the decisions referring to it are founded upon general principles; and finally to determine what is the state of the law to-day regarding *ignorantia juris* and *ignorantia facti* as defenses to criminal prosecutions. In order to do this with some degree of clearness it is necessary to define terms.

In the application of the maxim the word "*ignorantia*" has been translated as "ignorance" and as "mistake"; and these terms have generally been used interchangeably.³ It should be noted, however, that the two English words convey different ideas, which difference has been recognized in some instances.⁴ "Ignorance" may be defined as lack of knowledge; whereas a "mistake" is a wrong conclusion frequently caused by insufficient knowledge.⁵ Whether the criminality of a defendant is greater or less because his act is due to one rather than to the other of these will be discussed later.

¹ The maxim appears in various wordings. *Ignorantia legis neminem excusat*: Lush, J. in *Reg. v. Mayor of Tewkesbury*, 3 Q. B. 629, 639. *Ignorantia eorum, quae quis scire tenetur, non excusat*: 1 Hale P. C. 42. *Ignorantia excusatur, non juris sed facti*: 2 Bouvier, Law Dict. 355. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*: 4 Bl. Com. 27. *Ignorantia juris haud excusat*. *Cooper v. Phibbs*, L. R. 2 H. L. 149, 170.

² The application of the maxim in civil cases has been fully discussed and considered. See 2 Pomeroy, Eq. Jur., §§ 838-871; 7 Colum. L. Rev. 476; 6 Albany L. J. 103; 17 Cent. L. J. 422; 27 L. Mag. 90.

³ Bishop, New Crim. Law, § 292 *et seq.*; 4 Bl. Com. 27. The examples given in D. 22. 6. 9. support the use indicated. Austin treats *ignorantia* as meaning error or ignorance. Austin, Jur., § 688.

⁴ "Mistake may be said to be some unintentional act, omission or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Kerr, Fraud and Mistake, 396. See Story, Eq. Jur., § 110 and § 140, note 2, citing *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287. "The terms 'ignorance' and 'mistake,' in legal contemplation, do not import the same significance and should not be confounded. Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion." *Hutton v. Edgerton*, 6 S. C. 485, 489. See also 17 Cent. L. J. 22.

⁵ *Hutton v. Edgerton*, 6 S. C. 485, 489.

"Law," which is regarded as the English equivalent of "jus," may be defined as a rule or standard of conduct which has been prescribed by competent authority, and which it is the duty of a judicial tribunal to apply and enforce.¹ "The inquiry whether there be any such rule or standard, the determination of the exact meaning and scope of it, the definition of its terms, and the settlement of incidental questions, such as the conformity of it, in the mode of its enactment, with the requirements of a written constitution, are all naturally and justly classed together and allotted to the same tribunal; and these are called questions of law."² "Facts" are natural phenomena, which are the subject of testimony, and to which the law is applied by or under the direction of a judicial tribunal.³

A question as to the application of law to facts is a question of law.⁴ Thus, whether a man and a woman are married is a question of law, since the status is determined by the application of the law of marriage to the conduct of the parties. Consequently, where a mistake is made in applying law to fact, the mistake is one of law.⁵ In such cases "the law is either extended to things which it was not intended to govern, or a fact is improperly withdrawn from its domain. In either case there is really an error as to the purport and scope of the law."⁶

Blackstone says that the maxim as to *ignorantia* is a rule of both the Roman and the English law;⁷ and it is universally accepted that the doctrine is of Roman origin.⁸ In the Digest⁹ the rule is stated, *juris quidam ignorantiam cuique nocere, facti vero ignorantiam non nocere*, and our maxim *ignorantia juris non excusat, ignorantia facti excusat* is treated as the equivalent.¹⁰ The context and the examples given in the Digest, to illustrate the maxim, show that it was applied solely to civil actions and had no application in

¹ See Thayer, Prel. Treat. on Ev., 192; Davis v. Ballard, 24 Ky. 563, 576.

² Thayer, Prel. Treat. on Ev., 193.

³ See Thayer, Prel. Treat. on Ev., 190-192. See also Barr v. Chicago, St. L. and P. R. R. Co., 10 Ind. App. 433, 437.

⁴ Thayer, Prel. Treat. on Ev., 252. Goudsmit, Pandects (Gould's translation), § 52 n.

⁵ Cf. Dixon, C. J., in Hurd v. Hall, 12 Wis. 125, 138.

⁶ Goudsmit, Pandects (Gould's translation), § 52 n.

⁷ 4 Com. 27.

⁸ 3 Greenleaf, Ev., 16 ed., § 20.

⁹ D. 22. 6. 9.

¹⁰ "Regula est, *juris ignorantiam cuique nocere* is the language of the Pandects. *Ignorantia juris non excusat* is the maxim of the common law." Kerr, Fraud and Mistake, 396.

the law of crimes. Writers on the Roman Law treat the doctrine of *ignorantia* set forth in the Digest as applicable solely in the law of civil actions.¹ The reason given in the Digest, why *ignorantia juris* will not excuse, while *ignorantia facti* will, is that the law is certain and capable of being ascertained, while the construction of facts is difficult for even the most circumspect.² Under modern conditions, at least, it would hardly be seriously maintained that the former reason is sound.³

In the English law the earliest case found, in which the doctrine of *ignorantia* is considered, was decided in Hilary Term, 1231.⁴ In this case Robert Waggehastr' was summoned to answer one Wakelinus for breach of a fine committed by entering upon the land in question, which was in the possession of the mother of Wakelinus. Robert pleaded as a defense that he entered upon the land under the belief that the estate belonged to him, which belief was founded upon the advice of counsel. The court held that this was no defense, and ordered Robert to be imprisoned for breach of the fine.

Other cases illustrating the early use of the maxim, and showing the development of the doctrine of *ignorantia*, are worthy of notice.

Vernon's Case,⁵ decided in 1505, was an action of trespass brought against the defendants for carrying off the plaintiff's wife. The defendants justified on the ground that they were accompanying the woman to Westminster to sue for a divorce to ease her conscience. Objection was made to the plea on the ground that Westminster was not the proper place to take the woman for a divorce, but the plea was held good, "for perhaps they did not have knowledge of the law as to where the divorce should be sued."⁶

The Doctor and Student Dialogues,⁷ published in 1518, state the following rule: "Ignorance of the law (though it be invin-

¹ Hunter, Roman Law, 3 ed, 660; Domat, Civil Law, §§ 1224-1240; Amos, Roman Civil Law, 133; Curwin, Manual of Civil Law, 2 ed., 111; Goudsmit, Pandects (Gould's translation), § 52; Sandar, Institutes of Justinian, 388.

² D. 22. 6. 2.

³ "That any actual system is so knowable, or that any actual system has ever been so knowable, is so notoriously and ridiculously false that I shall not occupy your time with proof of the contrary." Austin, Jur., § 688.

⁴ Reported in Bracton's Note Book, Maitland's ed., pl. 496.

⁵ Y. B., 20 Hen. VII, f. 2, pl. 4.

⁶ "Car par cas ils n'avoïent conusance de le Ley on le divorcse seroit sue."

⁷ Dial. II., c. 46.

cible) doth not excuse as to the law but in a few cases; for every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law; but ignorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases." The doctrine was regarded as applicable in both civil and criminal cases.

In *Brett v. Rigden*,¹ 1568, a case involving the construction of a deed, Manwood, J., said: "It is to be presumed that no subject of this realm is miscognisant of the law whereby he is governed. Ignorance of the law excuses no one."

In *Mildmay's Case*,² 1584, an action was brought against the defendant for slandering the plaintiff's title, by stating that the title to the land was in some other person. The court held that, as the defendant had taken upon him a knowledge of the law, he must be bound, as "*ignorantia juris non excusat*."

In *Manser's Case*,³ 1584, an action of debt was brought against the defendant. It appeared in evidence that, by the terms of an agreement between the parties, the defendant and his son were to sign a certain release to the plaintiff. This release was prepared by the plaintiff, who then demanded that the defendant and his son sign the same. "Because his son was not lettered and could not read, the said John prayed the plaintiff to deliver it to him, to be showed to some man learned in the law, who might inform him if it was according to the condition." This the plaintiff refused to do, and brought action. The court decided that the son was not entitled to time to consult counsel, but should have signed the release at once. "*Ignorantia est duplex, viz. facti et juris. Ignorantia juris non excusat*."

King v. Lord Vaux,⁴ 1613. An indictment was brought against the defendant for refusing to take the oath of allegiance. The defendant, when arraigned, desired counsel to speak for him, "he being very ignorant of the proceedings of the Lawes of this Land." Hubbert, the Attorney-General, replied to this, "that there was no need of Councell for to be assigned to him in this case, for though he do pretend ignorance in himself in the laws of the Land (of which no Subject of the Land ought to be ignorant), for that his ignorance of the law will not excuse him, if so be that he do offend against the law." The court concurred in this view.

In *Levett's Case*,⁵ 1638, the defendant, under the mistaken belief

¹ 1 Plowd. 342.

² 1 Co. Rep. 175.

³ 2 Co. Rep. 3.

⁴ 1 Bulst. 197.

⁵ Cro. Car. 538.

that there were burglars in his house, killed a woman of whose presence he was ignorant. The court held that the defendant was not guilty of manslaughter, "for he did it ignorantly without intention of hurt to the said Frances."

Sir Matthew Hale, in his *Pleas of the Crown*,¹ published in 1680, said: "Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any that is of the age of discretion and *compos mentis* from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do; *Ignorantia eorum quae quis scire tenetur non excusat*. But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary." This may well be considered as the basic statement of the law of England as to *ignorantia*, and is generally cited as a leading authority for the present law on the subject.²

It is interesting to observe how the scope of the maxim, as indicated in the Doctor and Student Dialogues, differs from that set forth in the *Corpus Juris Civilis*. By the Roman Law the rule as to *ignorantia juris* did not apply to certain classes of individuals,³ because it was considered that these individuals, by reason of their status or condition, would not have a knowledge of the law. Those exempted were persons under twenty-five years,⁴ women,⁵ soldiers,⁶ and peasants and other persons of small intelligence.⁷ Austin points out that these persons were not exempt where their ignorance was as to some portion of the *jus gentium* as distinguished from the *jus civile*. "For the persons in question are not generally imbecile, and the *jus gentium* is knowable *naturali ratione*. With regard to the *jus civile* or to those parts of the Roman Law which are peculiar to the system, they may allege with effect their ignorance of the law."⁸

In the Doctor and Student Dialogues it is expressly stated that infants cannot avail themselves of ignorance as a defense.⁹ It is likewise stated that "knights and noblemen that are bound most properly to set their study to acts of chivalry for defense of the realm, and husbandmen that must use tillage and husbandry for

¹ 1 Hale, P. C. 42.

² See Broom, *Legal Maxims*, 7 ed., 266; Wharton, *Crim. Ev.*, § 723.

³ *Quibus jus ignorare permissum est*. D. 22. 6. 9.

⁴ D. 22. 6. 9.

⁵ D. 22. 6. 9.

⁶ D. 22. 6. 9. 1.

⁷ D. 49. 14. 2. 7.

⁸ Austin, *Jur.*, § 693.

⁹ *Dial. II. c. 46*.

the sustenance of the commonalty, and that may not by reason of their labor put themselves to know the law," are not discharged by ignorance of the law.¹

By the Digest² it is indicated that one, who has had no opportunity to consult counsel, should be excused for ignorance, but, it is said in the Dialogues,³ that if one acts on the improper advice of counsel, this does not constitute a defense.

II. IGNORANCE AND MISTAKE OF FACT.

It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind. An exception to this exists in a case where, by statute, the legislature either expressly or impliedly indicates that no such state of mind is necessary. Some offenses require a specific intent—a special state of mind which is an essential element of the criminal act. Thus the crime of larceny is not committed unless the defendant has the *animus furandi*.

Whenever a person, having the ability of reasoning to a conclusion,⁴ does a criminal act, he has the criminal mind. In order that one may be able to reason to a conclusion, he must have the power or capacity of reasoning, and the *data* upon which to base the reasoning. There must be a process and the materials upon which the process can operate. A defect in the process or in the materials will affect the result.

Whenever, then, the defendant does not have the ability to reason as considered above, he does not have the criminal mind. Infants under seven and lunatics are exempted from criminal responsibility, because they have not the power of reasoning. One who commits a criminal act under mistake of fact has a defense, because he has wrong or insufficient *data* for reasoning.⁵

¹ Dial. II. c. 46.

² D. 22. 6. 9.

³ Dial. I. c. 26.

⁴ The word "voluntarily" is usually employed in this connection, but as the term is capable of somewhat varying meanings, it was in this instance thought wise to express the idea in full.

"Doing the act voluntarily is evidence of the unlawful intent, and no other is requisite." Clopton, J., in *Mullens v. State*, 82 Ala. 42.

⁵ "But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary." 1 Hale, P. C. 42.

"The act of the insane person was not 'voluntary'; it was impelled by disease. Neither was the act of the woman marrying under mistake 'voluntary'; it was impelled by the

The defendant's criminality must be determined by his state of mind toward the situation in which he acted, and his state of mind will depend upon his impression of the facts. Hence he should be dealt with as if the facts were what he believed them to be. Then if, according to his belief concerning the facts, his act is criminal, he has the criminal mind as distinguished from motive, desire, or intention, and should be punished. If, on the other hand, his act would be innocent provided the facts were what he believed them to be, he does not have the criminal mind, and consequently should not be punished for his act.

Ignorance and mistake of fact,¹ therefore, are important in so far as they negative the criminal mind.²

There is no saving power in mistake itself. The fact that defendant says "I was mistaken" does not necessarily indicate that he is not guilty. It is only by showing the absence of the criminal mind due to his mistake that he can escape punishment for his criminal act. It follows that the mistake is no defense, where there is a prosecution under a statute, in which the legislature has indicated that no criminal mind is necessary for a conviction of the crime created by the statute.³

mistake. This is so even in civil affairs; for if one enters into a contract through mistake of fact, there is no 'voluntary' concord of minds, and the formal undertaking is not binding." Joel Prentiss Bishop in 4 So. L. Rev. (N. S.) 153.

"Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy." Cave, J., in *Reg. v. Tolson*, 23 Q. B. D. 168.

¹ There is no difference in result between ignorance of fact and mistake of fact. If the defendant is unaware of the existence of a fact, he reasons without reference to that fact, and hence he should be treated as if the fact did not exist. When the defendant has a mistaken view of a fact, he reasons with reference to this view, and his responsibility must be tested in the light of his belief. In either case the defendant has a wrong impression of the situation in which he acts.

² In *Levett's Case*, Cro. Car. 538, the court, in holding that the defendant would not be guilty of manslaughter where he acted in ignorance of a material fact, said "for he did it ignorantly without intention of hurt to the said Frances."

"Now here, although the proximate ground is ignorance or error, the ultimate ground is the absence of unlawful intention or unlawful inadvertence." Austin, Jur., § 687.

³ *Reg. v. Bishop*, 5 Q. B. D. 259; *Com. v. Emmons*, 98 Mass. 6; *Garver v. Oklahoma*, 49 Pac. 470; *State v. Kelly*, 54 Oh. St. 166. Except where the legislature expressly or impliedly indicates in a statute that no criminal mind is necessary, the existence of such mind is indispensable to the securing of a conviction under the statute. *Reg. v. Tolson*, 23 Q. B. D. 168; *State v. Brown*, 38 Kan. 390. In the article by Mr. Bishop, cited *supra*, he denies that the legislature ever dispenses with the requirement of criminal mind, and criticizes the cases where the defendant was held liable under a statute

In the following instances, in which the mistake does not negative the criminal mind, the defendant has no defense:

I. Though the defendant is mistaken, the act done is criminal under the facts as believed by him.¹

II. The defendant, while engaged in the commission of one criminal act, does another criminal act under ignorance or mistake of fact.² Here the criminal mind is carried over from the first act.

III. Where an act, itself immoral, is made a crime by statute when done under certain circumstances, it has been held that mistake as to the circumstances will not excuse one who does the act covered by the statute. There is some confusion among the authorities as to whether this result is reached, because under such a statute no criminal mind is necessary, or because the immoral intent will under the circumstances establish the culpability.³

IV. Defendant was negligent. Though it is not correct to say that negligence is the same as intent, yet negligence supplies

for selling adulterated food not knowing of the adulteration, claiming that the criminal mind should be proved in such cases.

Where the act covered by the statute is in the nature of a public tort rather than of a crime, it would seem clear that no criminal mind need to be proved.

In *Com. v. Mash*, 7 Met. (Mass.) 472, a woman was indicted for bigamy. The defendant married the second time under the mistaken belief that her former husband was dead. This was held to be no defense on the ground that no criminal mind was necessary in order to secure a conviction under the statute. A similar result was reached in *Com. v. Thompson*, 11 Allen 23. These cases are criticized in 4 So. L. Rev. (N. S.) 153.

In England there is an interesting series of *nisi prius* cases in which a mistaken belief in the death of the husband was set up as a defense to a prosecution of the wife for bigamy. *Martin, B.*, in *Reg. v. Turner*, 9 Cox C. C. 145, and *Cleasby, B.*, in *Reg. v. Horton*, 11 Cox C. C. 670, held that the mistake was a good defense. In *Reg. v. Gibbons*, 12 Cox C. C. 237, *Brett, J.*, after consulting with *Willes, J.*, decided, that the result in the two preceding cases was incorrect, and instructed the jury that the mistake was no defense. *Denman, J.*, in *Reg. v. Moore*, 13 Cox C. C. 544, discussed the three preceding cases and said that he preferred the view of the first two. In *Reg. v. Bennett*, 14 Cox C. C. 45, *Bramwell, L. J.*, followed *Reg. v. Gibbons*, instructing the jury to convict notwithstanding the mistake.

¹ *Reg. v. Lynch*, 1 Cox C. C. 361; *McGehee v. State*, 62 Miss. 772; *Reg. v. Smith, Dears.* C. C. 559. In these three cases the defendant assaulted the prosecuting witness under the belief that he was another person.

² "If A meaning to steal a Deer in the Park of B shooteth at the Deer, and by the glance of the arrow killeth a boy that is hidden in a bush; this is murder for that the act was unlawful, although A had no intention to hurt the boy, nor knew not of him." 3 Co. Inst. 56.

See article on "Crimes by Mistake" in 21 Ir. L. T. 213.

³ In *Com. v. Murphy*, 165 Mass. 66, and *State v. Newton*, 44 Ia. 45, where statutes made it a criminal offense to have intercourse with any girl under a certain age, it was held that mistake as to the girl's age would be no defense, as no criminal mind was

the place of intent, and, like intent, makes the mind criminal.¹ Hence, if the defendant is negligent a mistake will not excuse, for mistake is material only as it negatives a criminal mind, and here this is shown *aliunde*.²

The defendant's mind is equally criminal when he does a criminal act through negligence or when the mistake under which the defendant acted was due to negligence. Therefore a negligent mistake can be no defense.

The statement is often made by judges and commentators that a mistake of fact, in order to avail as a defense, must be "honest and reasonable."³ "Honest" in this connection can only mean that the defendant did in truth believe the facts to be different from what they were. It is, therefore, a truism to say that the mistake must be honest.

Must the mistake be reasonable? An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defense, he must have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence. If the mistake, whether reasonable or unreasonable, as

necessary under the statutes in question. In *Reg. v. Prince*, L. R. 2 C. C. 154, a statute made it an offense to take a girl under fourteen years out of the lawful possession of her father. The defendant did this, believing the girl to be over fourteen years. The court expressly admitted that the criminal mind was necessary, but said the defendant acted at his own risk. In *Lawrence v. Com.*, 30 Grat. (Va.) 845, a statute made it criminal to have intercourse with a girl under twelve years. The court held that it was no defense that the defendant believed the girl to be older, as he acted at his peril. In *State v. Houx*, 109 Mo. 654, the defendant was indicted under a statute for having intercourse with a girl under a certain age. Here the court in holding conviction proper said that mistake as to the girl's age was no defense, as the immoral intent supplied the place of the criminal intent.

¹ 1 Foster, C. L. 262; *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; *Rex v. Pittwood*, 19 T. L. R. 37; *Reg. v. Lowe*, 3 C. & K. 123.

² Bishop says, there is "little difference except in degree between a will to do a wrongful thing and an indifference whether it is done or not." New Crim. Law, § 313.

³ Cave, J., in *Reg. v. Tolson*, 23 Q. B. D. 168, 180; Kenny, *Outlines Crim. Law*, Am. Ed. 60.

judged by an external standard, does negative the criminal mind, there should be no conviction.

The requirement, that the mistake be reasonable in order to be a defense, at first sight appears the same as the rule that if the defendant be negligent his mistake will not avail. This similarity, however, is only seeming, for the test of negligence in the criminal law is not whether the defendant used the care of a reasonable man—an outer standard—but whether he used the care which appeared proper to him under the circumstances, that is “Did he do his best according to his own lights?”¹ In other words, the test is: Did the defendant act up to his own standard?²

An examination of the authorities shows that the courts often say (not infrequently without consideration) that the mistake must be reasonable.³ In some cases the question is discussed and the judges distinctly lay down the same proposition.⁴ In other cases “reasonableness” is not mentioned, and an “honest mistake” is stated to be sufficient.⁵

¹ See 12 HARV. L. REV. 428.

² Reg. v. Wagstaffe, 10 Cox C. C. 530. See Reg. v. Downes, 1 Q. B. D. 25; 12 HARV. L. REV. 428; 15 *ibid.* 500; 17 *ibid.* 347. There is a *dictum* in Com. v. Pierce, 138 Mass. 165, 178, to the effect that the care of a reasonable prudent man under similar circumstances should be the test in criminal as well as in civil cases.

³ Steinmyer v. People, 95 Ill. 383; Rineman v. State, 24 Ind. 80; Com. v. Power, 7 Met. (Mass.) 596; Com. v. Presby, 14 Gray (Mass.) 65; People v. Welch, 71 Mich. 548.

⁴ Gordon v. State, 52 Ala. 308; Stern v. State, 53 Ga. 229; Goetz v. State, 41 Ind. 162; Mulreed v. State, 107 Ind. 62.

⁵ Vaughan v. State, 83 Ala. 55; Myers v. State, 1 Conn. 502; Baker v. State, 17 Fla. 406; Causey v. State, 79 Ga. 564; Brown v. State, 24 Ind. 113; State v. Barrackmore, 47 Ia. 684; Com. v. Wood, 111 Mass. 408.

In Dotson v. State, 62 Ala. 141, the court says the mistake must be “without fault or carelessness.” This seems to be the proper view.

The question whether a mistake of fact must be reasonable is important when self-defense is set up as an excuse. In such a case the defendant seeks to escape liability, not because some element of guilt is lacking, but because he claims an excuse. It is held that a defendant may avail himself of this defense when he acted under a mistaken apprehension of serious bodily harm.

Here it may be held that the mistake must be reasonable; for the defendant does not offer the mistake as negating the criminal mind; but admitting this maintains that the state, because of circumstances, should not punish him. Since he asks to be forgiven when admittedly he had a criminal mind, it may not be improper to hold him to an external standard.

Bishop, however, claims that the test of the mistake in such cases should be “without fault or carelessness,” rather than “reasonable.” New Crim. Law, § 305. 2.

The Supreme Court of Tennessee in Grainger v. State, 5 Yerg. (Tenn.) 459, held that if a man through cowardice, without reasonable grounds, believes himself in danger of serious bodily injury he may kill. The doctrine of this case is expressly repudiated in

Where the defendant claims to escape criminal liability because he acted under a mistake of fact, there seems to arise, according to some judges, a question as to the burden of proof: whether it is upon the defendant to establish the mistake, or upon the prosecution to disprove the mistake, after it has been set up by the defendant. Although it is not necessary for the prosecution to aver the general criminal intent in the indictment,¹ yet, since the defendant's culpability depends upon such intent, its existence is an essential part of the prosecution's case, and must be proved when questioned by the defendant. Since the prosecution must prove beyond a reasonable doubt all the elements of the defendant's guilt,² there can be no conviction, when the defendant succeeds in creating a reasonable doubt.³ Hence, when the defendant has produced enough evidence of mistake to cast a reasonable doubt upon the existence of the criminal mind, the prosecution should not succeed unless it removes this doubt by disproving the mistake, or by showing that the mistake, under the circumstances of the case, did not negative the criminal mind. The burden to prove the defendant's guilt, which is upon the prosecution at the start, does not shift.⁴

Some courts have held, however, that the defendant has the burden of proving that he was mistaken.⁵

Shorter v. People, 2 Comst. (N. Y.) 193, and most cases hold that the defendant may excusably kill only when his mistaken apprehension is reasonable.

¹ Com. v. Hersey, 2 Allen (Mass.) 173; Beale, Crim. Pl. & Prac. § 135; Bishop, Crim. Proced., §§ 278-281.

² Starkie, Ev., 865; Beale, Crim. Pl. & Prac., § 292; 1 Bishop, Crim. Proced., § 818; Castle v. State, 75 Ind. 146.

³ Beale, Crim. Pl. & Prac., § 289; Thayer, Prel. Treat. Ev., 362, 363; Shaw, J., in Com. v. Webster, 5 Cush. 295, 320.

⁴ Com. v. Kimball, 41 Mass. 366; U. S. v. Gooding, 25 U. S. 460; Dubrose v. State, 10 Tex. App. 230.

When the defendant sets up *alibi* as defense, he denies one of the essentials of guilt, viz., that he was present at the fact. In such a case the defendant need not prove his absence, but the prosecution must prove his presence. Beale, Crim. Pl. & Prac., § 289; Wigmore, Ev., § 2512, and note containing collection of authorities.

Such defenses as mistake and *alibi*, each of which denies one of the elements of guilt, must not in this connection be confounded with defenses of an affirmative character under which the defendant admits the commission of the crime but claims exemption from punishment because of some excusing fact, such as self-defense. In such cases, though the evidence would be admissible under the general plea of not guilty, nevertheless, the defense in its essence is by way of confession and avoidance, and the defendant may properly be required to establish such defense. Beale, Crim. Pl. & Prac., § 291. The courts disagree as to the extent of the defendant's burden. See Wigmore, Ev., § 2512, n.

⁵ Marshall v. State, 49 Ala. 21; Bain v. State, 61 Ala. 75; Goetz v. State, 41 Ind.

A ground of defense that may appropriately be considered under the present title is "insane delusion." This may be defined as an unreasoning belief in non-existent facts, which belief is persistent and ineradicable, continuing notwithstanding evidence of the senses to the contrary.¹

In M'Naghten's Case² the fourth question put by the House of Lords to the judges was: "If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?" To which the judges replied: "Making the assumption that he labors under such partial delusions only and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real." This lays down the same test for insane delusion as for ordinary mistake of fact. This is a satisfactory test in cases where if the delusion were true the act done would be no crime. The criminal mind is as much negatived where the impressions are pure fictions of a disordered brain as where the impressions differ but partly from the facts as they really exist. The decisions are in accord with this view.³

There is, however, reason for questioning whether the converse of the above should hold; that is, whether the defendant should necessarily be punished when the act done would be criminal if the facts were as they appeared in the delusion to be. For example, take the case of a defendant who believed that another man had stolen his watch, and, acting under this delusion, killed the man. By the test of the judges there would be no defense in such a case, and this would be correct under the assumption made by the judges. The correctness of the test, therefore, depends upon the validity of the assumption that a man may act under an insane delusion and be perfectly sane in all other respects. Writers on medical jurisprudence strenuously deny that a man suffering from an insane delusion can be sane in all other particulars.⁴ Accord-

162; *Squire v. State*, 46 Ind. 459. On the strength of these four cases Bishop states the rule to be that "the burden of proof is on the party setting up the mistake to show it and its innocence." New Crim. Law, § 302. 3. Further cases in accord with this view are *Farbach v. State*, 24 Ind. 77; *State v. Brown*, 16 Pac. 259 (Kan.) (*semble*).

¹ See *Mercier, Criminal Responsibility*, 116, 117; *Bundy v. McKnight*, 48 Ind. 502, 512; *In re White*, 121 N. Y. 406, 413; *Guiteau's Case*, 10 Fed. 161, 171.

² 10 Cl. & F. 200.

³ *Com. v. Rogers*, 7 Met. (Mass.) 500; *Guiteau's Case*, 10 Fed. 161; *Smith v. State*, 55 Ark. 259.

⁴ "There is not, and there never has been, a person who labors under partial delusion, and is not in other respects insane." *Mercier, Criminal Responsibility*, 174. To

ing to this latter view the delusion, though immaterial as a mistake, is strong evidence of general derangement which may exempt the defendant from responsibility.¹

From this it follows that, in considering whether the defendant shall be convicted when he did a criminal act under an insane delusion, the dual character of delusion, as mistake and as a symptom of insanity, must be carefully borne in mind. This has been overlooked by some judges and writers on the subject, and the test of mistake is applied to delusion under the assumption that the defendant is in all other respects sane.²

In order that the defendant may escape criminal liability because he acted under an insane delusion it is clear that the standard of an ordinary, reasonable man cannot be applied, because the definition of delusion indicates that the belief of the defendant is not in accord with the impression which would ordinarily be obtained from the situation by the use of the senses. A man acting under an insane delusion is not an average, reasonable man. This seems to illustrate further the contention that a mistake of fact need not necessarily be reasonable in order to be a good defense.

III. IGNORANCE AND MISTAKE OF LAW.

The courts, following literally the doctrine of *ignorantia juris* as proclaimed by the maxim, have refused to accept ignorance, or mistake, of law as a defense.³ If an element of law enter into the

the same effect see 2 Stephen, Hist. Crim. Law, 157, 161; Ray, Med. Jur. of Insan., 283; article by Morton Prince, M.D., in 49 Jour. Amer. Med. Ass'n, 1643, 1645.

¹ 2 Stephen, Hist. Crim. Law, 161; Bishop, New Crim. Law, § 393.

² "A man may be insane as to certain objects and on certain subjects and perfectly sane with respect to other objects and on other subjects." Clark and Marshall, Crim. Law, § 96. Also Harris, Crim. Law, 3 ed., 24; State v. Huting, 21 Mo. 464; State v. Mewherter, 46 Ia. 88, 100. In Dew v. Clark, 3 Add. Ecc. 79, Sir John Nichol said that the contention that the law of England never deems a party sane and insane at the same time upon different subjects is incorrect. This view is approved in Buswell, Insanity, § 15.

³ Ignorance of law was held no defense in these cases: Rex v. Bailey, R. & R. 1; Rex v. Esop, 7 C. & P. 456; Rex v. Crawshaw, 1 Bell C. C. 303; Barronet's Case, 1 E. & B. 1; Schuster v. State, 48 Ala. 199; Winehart v. State, 6 Ind. 30; Jellico Coal Min. Co. v. Com., 96 Ky. 373; Grumbine v. State, 60 Md. 355; Com. v. Everson, 140 Mass. 292; Whitton v. State, 37 Miss. 379; State v. Wilforth, 74 Mo. 528; State v. Halsted, 39 N. J. L. 402; State v. Foster, 22 R. I. 163; Walker v. State, 2 Swan (Tenn.) 287; Brig Ann, 1 Gall. (U. S.) 62; U. S. v. Fourteen Packages, Gilp. (U. S.) 235; The Joseph, 8 Cranch (U. S.) 451; Wilson v. The Brig Mary, Gilp. (U. S.) 31. See notes 2 and 3 on p. 90.

It has been suggested in several instances that ignorance of law may properly be

mistake of defendant, such mistake is held to be no defense. There is, however, an exception to this general rule. When a specific criminal intent, as distinguished from the criminal mind, is a requisite element of the offense, and such intent is negated by ignorance or mistake, it is held that the defendant shall not be convicted, notwithstanding the maxim.¹ Although the writer fully recognizes that the courts enforce, and commentators approve, the general doctrine that mistake of law is no defense, nevertheless, it is suggested that on principle and analogy a different result may and

ground for pardon: *Rex v. Bailey*, R. & R. 1; or for reducing sentence, *Atkins v. State*, 95 Tenn. 474.

Mistake of law was no defense in the following: *Hoover v. State*, 59 Ala. 57; *Frasier v. State*, 112 Ga. 13; *Derixson v. State*, 65 Ind. 385; *Davis v. Com.*, 76 Ky. 318; *State v. Whitcomb*, 52 Ia. 85; *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Pisar v. State*, 56 Neb. 455; *Hamilton v. People*, 57 Barb. (N. Y.) 625; *Medrano v. State*, 22 S. W. 684 (Tex.).

Ignorance or mistake of law due to the advice of a public officer is held to be no defense. *Wilson v. The Brig Mary*, Gilp. (U. S.) 31; *The Joseph*, 8 Cranch (U. S.) 451; *Hoover v. State*, 59 Ala. 57; *Hamilton v. People*, 57 Barb. (N. Y.) 625; *State v. Foster*, 22 R. I. 163.

¹ "If A thinking he have title to the horse of B seisseth it as his own this makes it no felony but a trespass because there is a pretense of title." 1 Hale P. C. 508.

Larceny: *Reg. v. Reed*, 1 C. & M. 306; *Reg. v. Wade*, 11 Cox C. C. 549; *Morningstar v. State*, 55 Ala. 148; *State v. Bond*, 8 Ia. 540; *Com. v. Stebbins*, 8 Gray (Mass.) 492; *State v. Homes*, 17 Mo. 379; *People v. Husband*, 36 Mich. 306. Malicious trespass: *Palmer v. State*, 45 Ind. 388; *State v. Newkirk*, 49 Mo. 84; *State v. Hanks*, 66 N. C. 612; *Com. v. Cole*, 26 Pa. St. 187; *Dye v. Com.*, 7 Grat. (Va.) 662. Maliciously setting fire to furze: *Reg. v. Towse*, 14 Cox C. C. 327. Malicious damage: *Reg. v. Matthews*, 14 Cox C. C. 5; *Reg. v. Croft*, 111 C. C. C. Sess. Pap. 202; *Reg. v. Langford*, 1 C. & M. 602; *Goforth v. State*, 8 Humph. (Tenn.) 37. Robbery: *Rex v. Hall*, 3 C. & P. 409; *State v. Hollyway*, 41 Ia. 200. Assault with intent to rob: *Reg. v. Boden*, 1 C. & K. 395. Embezzlement: *Reg. v. Norman*, 1 C. & M. 501; *Beaty v. State*, 82 Ind. 228; *State v. Reilly*, 4 Mo. App. 392. Maliciously secreting property: *Hampton v. State*, 10 Lea (Tenn.) 639. Wilfully removing official seal: *U. S. v. Three Railroad Cars*, 1 Abb. U. S. 196. Perjury: *Rex v. Crespigny*, 1 Esp. 280; *Hood v. State*, 44 Ala. 81. Corruptly granting license: *People v. Jones*, 54 Barb. (N. Y.) 311. Feloniously taking deed from registry: *Com. v. Weld*, Thacher C. C. 157. Cutting, with intent to remove, timber from government lands: *U. S. v. Shuler*, 6 McLean (U. S.) 28. Extortion (corrupt): *State v. Porter*, 3 Brev. (S. C.) 175; *State v. Reeves*, 15 Kan. 396; *Com. v. Shed*, 1 Mass. 227. Knowingly rejecting vote: *Com. v. Lee*, 1 Brewst. (Pa.) 273. Knowingly receiving illegal vote: *Byrne v. State*, 12 Wis. 577; *State v. McDonald*, 4 Har. 555. Fraudulent voting: *Com. v. Algar*, Thacher C. C. 412; *Com. v. Bradford*, 9 Met. (Mass.) 268; *State v. Macomber*, 7 R. I. 349. Falsely acting as public officer: *Hall v. People*, 21 Mich. 456. Knowingly erasing the name of a voter: *State v. Smith*, 18 N. H. 91. Wilfully giving false answer at election: *Reg. v. Dods-worth*, 8 C. & P. 218.

Contra; Malicious shooting: *Rex v. Bailey*, R. & R. 1. Murder: *Rex v. Thomas*, East. T. 1816, MS.; *Weston v. Com.*, 111 Pa. St. 251. Larceny: *State v. Welch*, 73 Mo. 284. Fraudulent voting: *State v. Boyett*, 10 Ired. (N. C.) 336, 343, 344.

should properly be reached in certain cases where a criminal act is committed under a misconception of the law.

There are two classes of cases in which a man may act under a misconception of the law. In the first he does an act in ignorance that the law makes such act criminal. Here the misconception is due to lack of knowledge, and may be termed "ignorance of law," as when a man already married marries again in ignorance that a second marriage is unlawful. In the second case the defendant does an act under a misconception of the legal effect of certain facts; that is, he gets a wrong view of a situation as a result of the improper application of law to facts. Here an act, neutral in itself, becomes criminal by reason of some preceding situation or status. Thus, when a man marries, the criminal character of the marriage depends upon the question whether the man was already married. Such a question, as already shown,¹ is a question of law, because it deals with the application of law to facts. This second case may be termed "mistake" as distinguished from "ignorance" of law.

Under what has been termed "ignorance of law" may be grouped two situations. The first is when a man does an act without giving any attention to the law as such, in what may be termed unconsciousness that the law governs such a case;² the second, when he considers the law but believes that it does not govern the particular case.³ In each instance he does an act in ignorance that the law has made the act criminal.

It is the contention at this point that there is a distinction, so far as legal effect is concerned, between the two classes of cases designated by the headings "ignorance of law" and "mistake of law." This distinction is based upon the ground that ignorance of law does not negative the criminal mind, whereas mistake of law does. When a person, not insane, does an act, knowing its physical character, if the act is criminal the doer of the act has the criminal mind.⁴ Intending an act which the law has made criminal is the criminal mind. This is so even when the defendant has not the means or opportunity of knowing that the law exists which makes his act criminal, — for example, when the act was committed so short a time after the passage of a statute that the defendant could not possibly

¹ P. 77, *infra*.

² *Rex v. Esop*, 7 C. & P. 456; *Rex v. Crawshaw*, 1 Bell C. C. 303.

³ *Rex v. Soleguard*, Andr. 231; *Reg. v. Price*, 3 P. & D. 421.

⁴ See p. 81, *infra*.

have known of it.¹ The defendant has the criminal mind in such a case.² It follows that the reason why ignorance of the criminality of the act does not excuse is that in such a case the defendant has the criminal mind. The rule of law embraced in the language of the maxim is the fundamental rule that criminality is determined by the criminal mind.

It is a common statement that the rule concerning ignorance of law exists apart from the general principles of criminal jurisprudence, and must rest upon policy alone.³ Policy, however, should be invoked to support propositions of law only when these cannot be explained by general principles. At best policy is vague, and courts may well differ as to when it exists. It is also sometimes said that ignorance of law will not excuse, because "every one is presumed to know the law."⁴ If this presumption can be taken to mean that most persons do know the law, it is on its face absurd.⁵ If it means that in this connection it is immaterial whether one knows the law or not, it may be asked why this is so. The only answer is, that despite the ignorance all the elements of criminality are present.

When, on the other hand, a person does an act under an erroneous idea of a situation reached by applying law to facts, if the act done would not be criminal provided the situation were as he believed it, the defendant should have a good defense. He is in the same position, so far as his state of mind is concerned, as though the situation regarding which he was mistaken were one solely of fact. By applying the test which governs mistake of fact the defendant in the above case does not have the criminal mind.

The difference in legal effect between an act done in ignorance of law, and an act due to a mistake of law, may be illustrated by the following hypothetical cases. Suppose a statute making tres-

¹ Brig Ann, 1 Gall. (U. S.) 62. See *Oakland v. Carpentier*, 21 Cal. 642, 665.

² This result seems harsh, since the defendant was morally guiltless. The criminal mind does not, however, embrace any idea of moral wrong. A defendant may be guilty of a crime though his motive was morally commendable. *Reg. v. Sharpe*, 7 Cox C. C. 214.

³ Austin, Jur., § 689; Holmes, Com. Law, 48; Wharton, *Crim. Ev.*, § 723; Valentine, J., in *State v. Brown*, 16 Pac. 259, 260 (Kan.).

⁴ 1 Hale P. C. 42; 1 Hawkins P. C., Curwood's ed., 5, § 14, n.

⁵ "Now to affirm 'that every person may know the law' is to affirm what is not. And to say 'that his ignorance should not excuse him because he is bound to know' is simply to assign the rule as a reason for itself." Austin, Jur. § 669. See also 2 Stephen, *Hist. Crim. Law*, 114.

pass upon land criminal. Under this statute the criminal mind must be present in order to make the defendant culpable.¹ In the first case A enters upon the land of B in ignorance that the statute makes such entry unlawful. Here A would be guilty, as he has, for the reasons already given, the criminal mind. In the second case A believes that the title to certain land² is in him, and he enters upon the land, which, however, belongs to B. Here A should not be convicted under the statute, because, supposing the situation to be what he thought it, his act could not have been criminal.

In connection with the contention that the defendant no more has the criminal mind when the situation, with reference to which he acted, resulted from the application of law to facts than when the situation was one of fact solely, suppose, as above, a statute making trespass upon realty criminal. A and B own adjoining estates. Through each estate a private road leads from the highway to the owner's house. A while driving along the public road determines to turn into his own lane, but by mistake turns into the lane of B. In the second case A goes into a certain field which he thinks belongs to him, but the title is in B. There clearly could be no conviction of A in the first case, as he acted under a mistake of fact which negated the existence of the criminal mind. The mental attitude of the defendant in the second case was the same as in the first case. Hence he should have a defense in the second case.

Another case may well be considered. It is a recognized rule of law that a man cannot as principal commit rape upon his wife. A man by force has intercourse with a woman whom he believes to be his wife. The woman is not his wife, but resembles her in appearance. Another man, believing by reason of having gone through a marriage ceremony that a woman is his wife, has intercourse with her without her consent. It develops later that the ceremony of marriage was illegal, and the woman was not his wife. In each case the defendant committed the act believing the woman to be his wife; and if his belief had been correct, his act would have been no crime. In the first case the mistake was one of fact, while in the second the mistake was one of law. It does not seem right to convict the defendant in the second case and

¹ *Reg. v. Tolson*, 23 Q. B. D. 168.

² Title is determined by applying law to facts.

acquit him in the first. His mental attitude was the same in each case.¹

In the following cases, where the criminal mind, as distinguished from a specific intent, was negatived by a mistake of law as above defined, the courts, though perhaps not conscious of the significance of such a view, held that the defendant had a good defense.

Rex v. Forbes,² 1835. The defendant was indicted for forging P's name as acceptor of a bill of exchange. The defendant offered as a defense that he believed he had the authority to use P's name for that purpose. Coleridge, J., instructed the jury, that if the defendant *bona fide* believed that he had the authority to sign P's name to the bill there was no forgery.³

Regina v. Allday,⁴ 1837. In this case the defendant was indicted under a statute which made it a felony to write some matter or thing, liable to stamp duty, on paper on which previously some other matter liable to stamp duty had been written, before the paper had been again stamped. The defendant, who was authorized to issue licenses for the letting of post-horses, changed the date of a license and the term for which it was to run, under a mistake as to his rights in the matter. Lord Abinger instructed the jury: "It is a maxim older than the law of England, that a man is not guilty unless his mind be guilty. If a person through mistake thought he could alter this license, and send the 7s. 6d. to Somerset House, that would be no felony in law any more than it would be in reason, justice or common sense."

In *Dotson v. State*,⁵ 1869, where there was a prosecution under a statute, which made it an offense for any one to trespass upon another's land by cutting down timber with a view to converting the same to his own use, the following *dictum* appears: "If one commit a trespass upon the land of another, his good faith in the matter or ignorance of the true right or title will not exonerate him from

¹ "Where is the distinction between the mistake of fact which induces a woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband, but who is none?" Wills, J., in *Reg. v. Clarence*, 16 Cox C. C. 511. The second mistake is clearly one of law, though called mistake of fact.

² 7 C. & P. 224.

³ *Reg. v. Parish*, 8 C. & P. 94 and *Reg. v. Beard*, 8 C. & P. 143, are similar cases, in which the court instructed the jury as in *Rex v. Forbes*.

⁴ 8 C. & P. 136.

⁵ 6 Cold. (Tenn.) 545.

civil responsibility for the act. But when the statute affixes to such a trespass the consequences of a criminal offense, we will not presume that the Legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any such construction."

In *Cutter v. State*,¹ 1873, the defendant, a justice of the peace, was indicted under a statute which provided that "if any justice, etc., shall receive or take by color of his office, any fee or reward whatsoever, not allowed by the laws of this state, he shall be punished, etc." By way of defense the defendant showed that he took the money innocently believing that legally he had a right to the money taken. The court held that to secure a conviction under this statute a criminal mind was necessary, and that this was negated by the defendant's mistake.²

Squire v. State,³ 1874. This was a prosecution for bigamy. The defendant married a second time under the mistaken belief that his former wife had been divorced. The jury convicted the defendant. The court above held there should be a new trial and said *inter alia*: "We think the court should have charged the jury, if it had been so asked, that if they believed from the evidence that the defendant had been informed that his wife had been divorced and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, they should find him not guilty."

*State v. Goodenow*⁴ is a case commonly cited for the proposition that a mistake of law is no defense. In this case a man and woman were jointly indicted for adultery. They had cohabited as husband and wife while the woman was married to another man. The defendants contended that they should not be punished because they had no criminal mind, and offered evidence that the woman's first husband had married again, and that the justice of the peace who married the defendants told them that

¹ 36 N. J. L. 125.

² The court discusses (p. 127) a case in which a specific intent is made a "necessary constituent of the offense," and seems at this point to regard the principal case as being of this character. An examination of the statute in question reveals the fact that no such intent was made a part of the offense created by the statute.

³ 46 Ind. 459.

⁴ 65 Me. 30.

this marriage of the husband left the wife free to marry again, and the defendants believed this statement to be true. This evidence was rejected. The court above held such rejection proper. The decision, however, was not based upon the ground that the defendants' mistake as to their legal position could be no defense, but upon the ground that they were negligent. This is clearly shown by the following extract from the opinion: "There is no doubt that a person might commit an unlawful act, through mistake or accident, and with innocent intention, when there was no negligence or fault or want of care of any kind on his part, and be legally excused for it. But this case was far from one of that kind. Here it was criminal heedlessness on the part of both of the respondents to do what was done by them." It will be thus seen, that this case instead of being an authority against the present contention is in accord with it. The decision has been greatly misunderstood and it has been held on the supposed authority of this case that a similar mistake was no excuse in cases where there was no negligence.¹

In civil actions the distinction is recognized between a case in which an act is done without knowledge of the law governing that act, and a case in which an act is done under a wrong impression of a former situation produced by applying law to facts.²

It may be objected, that to make a distinction between the terms "ignorance" and "mistake" of law, as has been above attempted, is mere sophistry and for this reason should not be approved. Even if this be granted, it is still submitted that the legal conclusion contended for should be recognized. Where the defendant errs in applying law to facts, thus reaching an incorrect conclusion, and then does an act which would not have been criminal if the conclusion were correct, he should not be convicted, because he does not have the guilty mind.³ Such an error may be said to be a "mistake of

¹ *State v. Whitcomb*, 52 Ia. 85. See also *Hoover v. State*, 59 Ala. 57.

² "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities or other relation either of property or contract or legal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." *Pomeroy, Eq. Jur.*, § 849.

³ If the mistake fails to negative the criminal mind, for the reasons considered under mistake of fact, or because the defendant was negligent, his mistake should be no defense.

mixed law and fact";¹ or, it may be called a "mistake of fact";² or, it may be stated that when an element of fact enters into the error there can be no conviction, if the criminal mind is negatived; or, it may be said that there should be a defense when a mistake is made concerning a private right as distinguished from a rule of law;³ or, finally, the error may be named "mistake of law" as defined in this article. The phraseology is immaterial. Nevertheless, it is urged that there is a real distinction between such a case and one in which a criminal act is committed with full knowledge of the circumstances, but in ignorance that the act is criminal. It is further urged that this distinction rests upon fundamental principles of criminal jurisprudence.

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¹ Bishop, New Crim. Law, § 311. In *State v. Castle*, 44 Wis. 670, 684, where the defendant mistakenly believed that a certain road was not a highway, Ryan, C. J., said that the validity of the highway was a mixed question of law and fact.

² See Pomeroy, Eq. Jur., § 849. See quotation from opinion of Wills, J., in *Reg. v. Clarence*, 16 Cox C. C. 511 in note on p. 93, *infra*.

³ Kerr, Fraud and Mistake, 398.

LAW AND MORALS.¹

PRIMITIVE law regards the word and the act of the individual; it searches not his heart. "The thought of man shall not be tried," said Chief Justice Brian, one of the best of the medieval lawyers, "for the devil himself knoweth not the thought of man."²

As a consequence early law is formal and unmoral. Are these adjectives properly to be applied to the English common law at any time within the period covered by the reports of litigated cases? To answer this question let us consider, first, the rule of liability for damage caused to one person by the act of another. Not quite six hundred years ago an action of trespass was brought in the King's Bench for a battery. The jury found that the plaintiff was beaten, but that this was because of his assailing the defendant who had acted purely in self-defense, and that the action was brought out of malice. It was nevertheless adjudged that the plaintiff should recover his damages according to the jury's verdict, and that the defendant should go to prison. The defendant had committed the act of battery; therefore he must make reparation. He was not permitted to justify his act as done in protecting himself from the attack of the plaintiff. That attack rendered the plaintiff liable to a cross action, but did not take away his own action.

The case we have just considered was an action for compensation for a tort. Suppose, however, that the defendant, instead of merely injuring his assailant, had killed him in self-defense, using no unnecessary force. Did the early English law so completely ignore the moral quality of the act of killing in self-defense as to make it a crime? Strictly speaking, yes. An official reporter of the time of Edward III³ and Lord Coke⁴ were doubtless in error in stating that prior to 1267 a man "was hanged in such a case just as if he had acted feloniously." But such killing was not jus-

¹ From an address delivered at the seventy-fifth anniversary of the Cincinnati Law School, and reprinted by permission of the University of Cincinnati Record.

² Y. B. 7 Ed. IV, f. 2, pl. 2.

³ Y. B. 21 Ed. III, f. 17, pl. 22.

⁴ Coke, Second Inst., 148.

tifiable homicide. The party indicted was not entitled to an acquittal by the jury. He was sent back to prison, and must trust to the king's mercy for a pardon. Furthermore, although he obtained the pardon, he forfeited his goods for the crime. But the moral sense of the community could not tolerate indefinitely the idea that a blameless self-defender was a criminal, or that he should have to make compensation to his culpable assailant. By 1400 self-defense had become a bar to an action for a battery. Pardons for killing in self-defense became a matter of course; ultimately the jury was allowed to give a verdict of not guilty in such cases, and the practice of forfeiting the goods of the defendant died out.

Let us test the rule of liability by another class of cases. One person may have injured another without fault on either side, by a pure accident. The case against the actor in such a case is obviously stronger than against one who inflicts damage in self-defense. Accordingly we are prepared for this language of the Statute of Gloucester, 6 Ed. I, c. 9, 1278: "If one kills another in defending himself, or by misadventure, he shall be held liable, but the judge shall inform the king, and the king will pardon him, if he pleases."¹ *A fortiori* the actor was bound to make compensation to the victim of the accident. The criminal liability disappeared comparatively early, as in the case of killing in self-defense. But the doctrine of civil liability for accidental damage caused by a morally innocent actor was very persistent. It was stated forcibly by an eminent judge in 1681 as follows: "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering. If a man shoot at butts and hurt a man unawares an action lies. . . . If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there '*Actus non facit reum, nisi mens sit rea.*'"² As pointed out by Sir Frederick Pollock, in his treatise on torts,³ a similar opinion was expressed subsequently by Blackstone, Erskine, Mr. Justice Grose, and as late as 1868 by Lord Cranworth. Erskine's statement goes very far: "If a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete an-

¹ See also Y. B. 2 Hen. IV, f. 18, pl. 6, per Thirning, C. J.

² *Lambert v. Bessey*, T. Ray. 421.

³ 8 ed., 142.

swer to an *indictment* for trespass, but he must answer in an *action* for everything he has broken." There were, however, from time to time certain intimations from the judges that in the absence of negligence, an unintentional injury to another would not render the actor liable, and finally in 1891 a case was brought in the Queen's Bench¹ which required the court to decide whether the old rule of strict liability was still in force or must give way to a rule of liability based upon moral culpability. The defendant, one of a hunting party, fired at a pheasant. The shot, glancing from the bough of an oak tree, penetrated the eye of the plaintiff, destroying his sight. The jury found that the defendant had not acted negligently, and the court decided that the defendant was not liable. The same result was reached in Massachusetts forty years earlier,² and this precedent has been followed in other states.

So that today we may say that the old law has been radically transformed. The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of today, except in certain cases based upon public policy, asks the further question, "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril. Nor is the modern ethical doctrine applied even now to all cases logically within its scope. Under this doctrine a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another. The lunatic homicide ceased to forfeit his goods or to require the king's pardon centuries ago. But there is no English decision that a lunatic need not make reparation to one injured by his act. There is, to be sure, no English decision to the contrary; but there are several *dicta* against the lunatic, and an unreasoning respect for these *dicta* has led to several regrettable decisions in this country and in the British Colonies. These decisions must be regarded as survivals of the ancient rule that where a loss must be borne by one of two innocent persons, it shall be borne by him who acted. Inasmuch as nearly all the English writers upon torts, and many of the American writers also, express the opinion that the lunatic, not being culpable, should not be held responsible, it is not unreasonable to anticipate that the English

¹ Stanley v. Powell, [1891] 1 Q. B. 86.

² Brown v. Kendall, 6 Cush. (Mass.) 292.

courts and the American courts, not already committed to the contrary doctrine, will sooner or later apply to the lunatic the ethical principle of no liability without fault. The continental law upon this point is instructive. By the early French and German law the lunatic was liable as in England for damage that he caused to another. In France today the lunatic is absolutely exempt from liability. The new German Code has a general provision to the same effect, but this code, resembling in this respect the law of Switzerland and Portugal, makes this qualification of the rule of non-liability. If compensation cannot be obtained from the person in charge of the lunatic, the court may order the lunatic to pay such compensation as seems equitable under the circumstances, having regard especially to the relative pecuniary situation of the parties, and so that the lunatic shall not in any event be deprived of the means of maintaining himself in accordance with his station in life, or of complying with his legal duties as to the maintenance of others. This compulsory contribution by the rich lunatic to his poor victim with freedom from liability in other cases may well prove to give the best practical results.

We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor. The history of the law of contracts exhibits a similar transformation in the legal significance of the written or spoken word. By the early law, in the absence of the formal word, there was no liability, however repugnant to justice the result might be. On the other hand, if the formal word was given, then the giver was bound, however unrighteous, by reason of the circumstances under which he gave it, it might be to hold him to his promise. The persistence of this unmoral doctrine in the English law is most surprising. As late as 1606 the plaintiff brought an action alleging that the defendant, a goldsmith, sold him a stone affirming it to be a bezoar stone, whereas it was not such a stone. The court gave judgment against the plaintiff on the ground "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action."¹ The buyer reasonably supposed that he was getting a valuable jewel for his hundred pounds, but he must pocket his loss, since the goldsmith did not use the magic

¹ *Chandler v. Lopus*, Dy., 75 a, n. 23; Cro. Jac. 4.

words "I warrant" or "I undertake." Today, of course, the sale of a chattel as being of a particular description implies a warranty or undertaking to that effect. But the notion of implying a promise from the conduct of the party was altogether foreign to the mental operations of the medieval lawyer. For this reason the buyer took the risk of the seller's not being the owner of the property sold unless the seller expressly warranted the title. In the case of goods the mere selling as owner is today a warranty of title, but the rules of real property not being readily changed the archaic law still survives in the case of conveyances of land, the grantee being without remedy if there is no covenant of title in the deed. The inability to imply a promise from the conduct of the parties explains this remark of Chief Justice Brian: "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me."¹ Similarly in the reign of Elizabeth a gentleman of quality put up at an inn with his servants and horses. But no price was agreed upon for his accommodations. The gentleman declining to pay, the innkeeper could obtain no relief at law.² Neither the customer nor the guest had made an express promise to pay. The law could not continue in this state. It was shocking to the moral sense of the community that a man should not pay for what was given him upon the mutual understanding that it should be paid for. Accordingly the judges at length realized and declared that the act of employing a workman, ordering goods, or putting up at an inn meant, without more, an undertaking to make reasonable compensation.

There is a certain analogy between the ethical development of the law and that of the individual. As early law is formal and unmoral, so the child or youth is wont to be technical at the expense of fairness. This was brought home to me once by an experience with one of my sons, then about twelve years old. I asked him one day about his plans for the afternoon, and he told me he was to play tennis with his friend John. In the evening, when asked if he had had a good afternoon with John, he said, "Oh, I have n't been with him. I thought I would rather play with Willie." "But did n't John expect you?" "Yes, I suppose he did." "Was it quite right, after you had led him to expect you, to disappoint him?" "Oh, but I did n't promise him that I would come." Remembering Chief Justice Brian, I was lenient with the boy.

¹ Y. B. 12 Edw. IV, f. 9, pl. 22.

² Young v. Ashburnham, 3 Leon. 161.

The significance of the written word in the early law is illustrated by the rule that one who claimed the benefit of a promise under seal must produce it in court. The promise under seal was regarded not as evidence of the contract, but as the contract itself. Accordingly, the loss or destruction of the instrument would logically mean the loss of all the promisee's rights against the promisor. And such was the law: "When the action is upon a specialty, if the specialty is lost the whole action is lost," is the language of a Year Book judge.¹ The injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, but not until the seventeenth century.² A century later the common law judges, by judicial legislation and against the judgment of Lord Eldon, allowed the obligee to recover upon secondary evidence of a lost specialty.

The formal and unmoral attitude of the common law in dealing with contracts under seal appears most conspicuously in the treatment of defenses based upon the conduct of the obligee. As the obligee, as we have seen, who could not produce the specialty, was powerless at common law against the obligor, who unconscionably refused to fulfill his promise, so the obligor who had formally executed the instrument was at common law helpless against an obligee who had the specialty, no matter how reprehensible his conduct in seeking to enforce it. In 1835, in an English case, the defendant's defense to an action upon a bond, that it had been obtained from him by fraudulent representations, was not allowed, Lord Abinger saying: "You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defense is unavailing when once it is shown that the party knew perfectly well the nature of the deed which he was executing."³

Similarly, in an action upon a specialty, it was no defense at common law that the consideration for it had failed.⁴ Nor that it was given for an illegal or immoral purpose, if this did not appear upon the face of the instrument.⁵ How completely ethical considerations were ignored by the common law judges in dealing with

¹ Y. B. 24 Ed. III, f. 24, pl. 1.

² 9 See HARV. L. REV. 50, n. 1.

³ *Mason v. Ditchbourne*, 1 M. & Rob. 460.

⁴ See 9 HARV. L. REV. 52.

⁵ *Ibid.*

formal contracts is shown by the numerous cases deciding that a covenantor who had paid the full amount due on the covenant, but without taking a release or securing the destruction or cancellation of the instrument, must, nevertheless, pay a second time if the obligee was unconscionable enough to bring an action.¹ In the eye of the common law in all these cases the defendant had given the specialty to the plaintiff intending it to be his: the plaintiff still had it; therefore, let him recover the fruit of his property. In all these cases, however, equity sooner or later gave relief. Equity recognized his common law property right in the specialty, but, because of his unconscionable acquisition or retention of it, commanded him, under pain of imprisonment, to abstain from the exercise of his common law right. Finally, by legislation in England and in nearly all our states, defendants were allowed to plead at common law, as equitable defenses, facts which would have entitled them to a permanent, unconditional injunction in equity. It is to be observed, however, that there is no federal legislation to this effect, so that it is still true that in the federal courts fraud cannot be pleaded in bar of a common law action upon a specialty, the only remedy of the defendant being a bill in equity for an injunction to restrain the action.²

The illustrations, thus far considered, of the unmoral character of the early common law exhibit that law in its worst aspect, as an instrument of injustice, as permitting unmeritorious or even culpable plaintiffs to use the machinery of the court as a means of collecting money from blameless defendants.

Let us turn from the sins of commission to some of the sins of omission in the common law, and consider how these defects in the law were cured.

The early common law, as might be supposed, gave fairly adequate remedies for the infringement of the rights of personal safety or personal liberty, and also for the violation of the rights to or in tangible property. But for injuries to one's reputation or damage to one's general welfare or pecuniary condition the relief was of the slightest. Suppose, for example, a person circulated a false story that a tradesman cheated by giving false measure, or that a servant had stolen from his master, in consequence of which the tradesman lost his customers or the servant his place. The common law prior to 1500 gave no redress

¹ See 9 HARV. L. REV. 54.

² *Ibid.* 51.

against the slanderer.¹ If a buyer was induced by the fraudulent representations of the seller to give a large price for a worthless chattel, he could for centuries maintain no action for damages against his deceiver.² Not until near the end of the seventeenth century could an innocent man who had been tried and acquitted upon an indictment for murder or other crime obtain compensation for the ignominy and damage to which he had been subjected, although it was clear that the defendant had instigated the criminal prosecution malevolently, and knowing that the plaintiff was innocent.³ Prior to the reign of Henry VII there was no action for the breach of a promise not under seal, although given for a consideration.⁴ Sooner or later the law was changed and the courts allowed an action for damages in all these cases. These innovations were not, however, the result of successive statutes passed to satisfy the popular demand for reform at the time. On the contrary, they were all the product of a few lines in a statute enacted near the end of the thirteenth century, providing that "Whensoever from thenceforth a writ shall be found in the Chancery, and in a like case falling under the same right and requiring a like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors."⁵ This beneficent statute of Edward I, the origin of all our actions of trespass on the case, has been the great reforming agency in supplying the defects of the common law. Upon this statute is based our whole law of actions for defamation, for malicious prosecution and for deceit, as well as the whole law of assumpsit, which came practically to be the remedy for all modern contracts except contracts under seal. Of the great number of applications of the Statute of Westminster these actions on the case for defamation, deceit, malicious prosecution, and breach of promise, together with the action for nuisances, are the ones which, more than all others, have contributed to the beneficent expansion of the common law. Even after these great innovations there were many grievous defects in the common law scheme of remedies for damage inflicted upon one person by

¹ Y. B. 17 Ed. IV, f. 3, pl. 2; Y. B. 27 Hen. VIII, f. 14, pl. 4.

² See 2 HARV. L. REV. 9.

³ *Savile v. Roberts*, 1 Ld. Ray. 374.

⁴ 2 HARV. L. REV. 13.

⁵ St. Westminster 2, 13 Ed. I, c. 24.

the reprehensible act of another. Until the time of Lord Holt, one who had suffered from the unauthorized misconduct of a servant acting within the scope of his employment could obtain no compensation from the master.¹ The earliest suggestions of relief against the unauthorized printing by a stranger of the unpublished work of an author are in the second quarter of the eighteenth century.² Prior to 1745, no husband whose wife had been induced to leave him by the wrongful persuasion of another had ever recovered compensation from the disturber of the marriage relation.³ Not until twenty years after the establishment of this school would an action lie against one who wantonly or selfishly induced a person under contract with the plaintiff to break the contract.⁴ As recently as 1874 the English court decided for the first time that one who untruthfully disparaged the goods of a tradesman must make compensation for the resulting damage.⁵ In all these cases the remedy when finally introduced by the court was in the form of the action on the case, sanctioned by the Statute of Edward I.

Is this statute, now more than six hundred years old, still a living force for the betterment of the common law in England and the United States? There can be but one answer to that question. This statute is a perennial fountain of justice to be drawn upon so long as, in a given jurisdiction, instances may be pointed out in which the common law courts have failed to give a remedy for damage inflicted upon one person by the reprehensible act of another, and the continued absence of a remedy would shock the moral sense of the community.

But with everything done that could be done by this statute, our law as a whole would have been a very imperfect instrument of justice if the system of common law remedies had not been supplemented by the system of equitable remedies. Blackstone has asserted that the common law judges by a liberal interpretation of the Statute of Westminster by means of the action on the case might have done the work of a court of equity. Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, namely, that the law acts *in*

¹ *Boson v. Sanford*, 2 Salk. 440.

² *Webb v. Rose*, 3 Sw. 674; 1 Ames Cases in Eq. Jur., 659.

³ *Winsmore v. Greenbank*, Willes, 577.

⁴ *Lumley v. Gye*, 2 E. & B. 216.

⁵ *Western Co. v. Lawes Co.*, L. R., 9 Ex. 218.

rem, while equity acts *in personam*. The difference between the judgment at law and the decree in equity goes to the root of the whole matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages, because they are his. Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make compensation for his wrong. It is this higher standard of morality that equity enforces wherever the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant by injunction to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy.

The great bulk of the exclusive jurisdiction of equity falls under two heads, Bills for Restitution and Bills for Specific Performance. The object of bills for restitution is to compel the surrender by the defendant of property wrongfully obtained from the plaintiff, or of property properly acquired but improperly retained because of some misconduct after its acquisition.* Bills for restitution are very ancient. In the fourteenth and fifteenth century there were bills for the reconveyance of property acquired by fraud or mistake or retained by a defendant after failing to give the stipulated equivalent for the property.¹ Somewhat later we find bills to restrain the enforcement and compel the surrender of specialty contracts obtained fraudulently, illegally, or by mistake, or retained after payment or in spite of failure of consideration.² Early in the seventeenth century Lord Ellesmere, in his

¹ 21 HARV. L. REV. 262.

² 9 *Ibid.* 51, 52, 54-55.

famous controversy with Lord Coke, established the right to restrain the enforcement of a common law judgment obtained by fraud.¹ In this same century mortgagees were compelled to surrender the mortgaged property notwithstanding the default of the mortgagor and in disregard of the express agreement of the parties, upon payment of the mortgage debt and interest,² and to prevent a similar hardship, holders of penal bonds were compelled to give them up without exacting the penalty.³ In the eighteenth century, without proof of any fraudulent misrepresentation, decrees for reconveyance were made upon the ground of undue influence, growing out of the relations of the parties, as in the case of conveyances by client to attorney, ward to guardian, child to parent and the like. And in the last century grantees, who had acquired property by innocent misrepresentation, were obliged to restore it to their grantors.⁴ The relief in these cases consists in undoing the original transaction and restoring the *status quo*, a result, of course, not anticipated by either party at the outset. In other words, equity treated the defendant as holding the property upon a constructive trust for the plaintiff.

On the other hand, bills against express trustees form the staple of the exercise of the exclusive jurisdiction of equity by way of specific performance. Equity began to enforce the performance of uses and trusts soon after 1400.⁵

In giving relief by decrees for restitution against constructive trustees, or by decrees for specific performances against express trustees, equity has acted upon the highly moral principle that no one should, by the wrongful acquisition or retention of a title, unjustly enrich himself at the expense of another.

In the cases thus far considered this doctrine of unjust enrichment was enforced against the original grantee of the property and because of his misconduct in the relation between him and the grantor. But it is a long-established principle that anyone who acquires property from another who, as he knows, holds it subject to a trust or other equity, and also anyone who, without such knowledge, acquires property so held, if he gives no value for it, may be compelled himself to perform the trust or other

¹ Wilson, *Life of James I*, 94, 95; ² Campbell, *Lives of Lord Chancellors*, 241.

² *1* Spence, *Eq. Jur.*, 602-603.

³ *Ibid.* 629.

⁴ *Redgrave v. Hurd*, 20 Ch. D. 1.

⁵ 21 HARV. L. REV. 265.

equitable obligation. It is true there is no direct relation between the equitable claimant and the buyer with notice or the donee without notice. But if the one could knowingly acquire, or the other knowingly keep, the property free from the trust or other equity, he would be profiting unconscionably at the expense of the *cestui que trust* or other equitable claimant. These applications of the doctrine of unjust enrichment are good illustrations of the highly moral quality of equity jurisdiction. They are almost unknown to the Roman law, and are but imperfectly recognized in modern continental law.

There is another doctrine of equity which has only a limited operation in countries whose law is based on the Roman law, the doctrine that no one shall make a profit from the violation of an equitable duty, even though he is ready to make full compensation to him whose equitable right he has infringed. A trustee, for example, of land worth \$5,000 in breach of trust conveys it to a purchaser for value without notice of the trust, receiving in exchange fifty shares of corporate stock. The shares appreciate and become worth \$10,000, while the land depreciates to \$3,000. The delinquent trustee may be compelled to surrender the shares to the *cestui que trust*, although the latter thereby gets \$7,000 more than he would have had if there had been no breach of trust. If the shares had depreciated and the land appreciated, the *cestui que trust* would be entitled to the increased value of the land. It is a wholesome principle that whatever the misconducting trustee wins he wins for his beneficiary, and whatever he loses he loses for himself.

The equitable rules which prohibit a fiduciary, while in the performance of his fiduciary duty, from competing in any way with the interest of his beneficiary, and permit dealings between them only upon clear evidence of the good faith of the fiduciary, and of a complete disclosure of all his knowledge as to the matters entrusted to him, and in fact the whole law of equity as to fiduciaries, enforce a moral standard considerably in advance of that of the average business man. Enough has been said to make plain that much as our law owes to the action on the case for its ethical quality, it is to the principles of the court of equity, acting upon the conscience of the defendants and compelling them by decrees of restitution and specific performance to do what in justice and right they ought to do, that we must look to justify our belief that the English and American systems of

law, however imperfect, are further on the road to perfection than those of other countries.

In considering the possibility of further improvements of the law we must recognize at the outset that there are some permanent limitations upon the enforcement in the courts of duties whose performance is required in the forum of morals.

On grounds of public policy there are and always will be, on the one hand, many cases in which persons damaged may recover compensation from others whose conduct was morally blameless, and, on the other hand, many cases in which persons damaged cannot obtain compensation even from those whose conduct was morally most reprehensible.

Instances of unsuccessful actions against persons free from fault readily suggest themselves. The master, who has used all possible care in the selection of his servants, is liable for damage by them when acting within the scope of their employment, although they carelessly or even wilfully disregard his instructions. The business is carried on for the master's benefit, and it is thought to be expedient that he, rather than a stranger, should take the risk of the servant's misconduct. One keeps fierce, wild animals at his peril, and also domestic animals, after knowledge that they are dangerous. By legislation, indeed, in several states, one who keeps a dog must make three-fold compensation, in one state ten-fold compensation, for damage done by the dog, without proof of the keeper's knowledge of its vicious quality. The sheep farmers must be encouraged, even if some innocent persons have to pay dearly for the luxury of keeping a dog. A Massachusetts bank was entered by burglars who carried off and put into circulation a large quantity of bank notes which had been printed but never issued by the bank. The bank had to pay these notes. The bank must safeguard the notes it prints at its peril, to prevent the possibility of a widespread mischief to the general public.

The results in these cases are much less disturbing to one's sense of fairness than in those in which the innocent victims of the unrighteous are allowed no redress. For example, a will is found after a man's death giving all his property to his brother. In the same box with the will is a letter, not referred to in the will, addressed to the brother, telling him that he is to hold the property in trust for their sister. The brother insists upon keeping the property for himself. The court is powerless to help the

defrauded sister. The rule that the intention of the testator must be found exclusively in the duly-witnessed document, in view of the danger of perjury and forgery, is the best security for giving effect to the true will of the generality of testators. The defenses of infancy, statute of frauds, statute of limitations, or that a promise was gratuitous are only too often dishonorable defenses, but their abolition would probably increase rather than diminish injustice. An English judge said from the bench: "You are a harpy, preying on the vitals of the poor." The words were false and spoken for the sole purpose of injuring the person addressed. The latter could maintain no action against the judge. It is believed to be for the public interest that no judge should be called to account in a civil action for words spoken while on the bench.

The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed. That is why, in the cases just considered and others that will occur to you, the innocent suffer and the wicked go unpunished.

But unless exempted from liability by considerations of enlightened public policy, I can see no reason why he who has by his act wilfully caused damage to another should not in all cases make either specific reparation or pecuniary compensation to his victim.

Has this principle become a part of our law? Let us consider a few concrete cases. A man kills his daughter in order to inherit her real estate. Under the statute the land descends to him as her heir. May he keep it? It seems clear that equity should compel him to surrender the property. As it is impossible to make specific reparation to the deceased, he should be treated as a constructive trustee for those who represent her, that is, her heirs, the murderer being counted out in determining who are the heirs. But in several states the murderer is allowed to keep the fruits of his crime.¹

A handsome, modest young lady is photographed without her consent and her likeness is reproduced and sent broadcast through the land as part of an advertising label with the legend, "The Flower of the Family," placed upon thousands of barrels of

¹ 36 Am. L. Reg. and Rev. 225; *Wellner v. Eckstein*, 117 N. W. 830 (Minn., 1908. Two judges dissenting). In New York the rule is the other way.

flour. Here, too, the courts are divided as to whether she should have relief. It being well settled and properly settled that the recipient of a letter commits a tort if he publishes it without the consent of the writer, there should be little difficulty in preventing the greater invasion of privacy in using the portrait of a modest girl as an advertising medium. Suppose, again, that the owner of land sinks a well, not in order to get water for himself, but solely for the purpose of draining his neighbor's spring, or that he erects an abnormally high fence on his own land, but near the boundary, not for any advantage of his own, but merely to darken his neighbor's windows or to obstruct his view. Is the landowner responsible to his neighbor for the damage arising from such malevolent conduct? In thirteen of our states he must make compensation for malevolently draining the neighbor's spring. In two other states the opposite has been decided. In four states one who erects a spite fence must pay for the damage to the neighbor. In six others he incurs no liability. Six states have passed special statutes giving an action for building such a fence. In Germany and France and in other continental countries an action is allowed against the landowner in both cases.

The principle I have suggested would allow relief in all of these cases, and its adoption by the courts is fairly justified by the rules of equity and the Statute of Edward I. This principle is very neatly expressed in the new German Code: "Any act done wilfully by means of which damage is done to another in a manner *contra bonos mores* is an unlawful act."

To put quite a different case, should statutes be passed giving compensation by the state to an innocent man for an unmerited conviction and punishment? The state, it is true, has merely done its duty in carrying through the prosecution. But the prosecution was made for the benefit of the community, and is it not just that the community rather than an innocent member of it should pay for its mistakes? By recent legislation Germany has provided compensation for the innocent sufferer in such cases.

In these cases in which it is suggested that the person damaged ought to recover compensation, the damage was caused by the wilful act of the party to be charged. It remains to consider whether the law should ever go so far as to give compensation or to inflict punishment for damage which would not have happened but for the wilful inaction of another. I exclude cases in which, by reason of

some relation between the parties like that of father and child, nurse and invalid, master and servant and others, there is a recognized legal duty to act. In the case supposed the only relation between the parties is that both are human beings. As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown. Or, again, I see a child on the railroad track too young to appreciate the danger of the approaching train. I might easily save the child, but do nothing, and the child, though it lives, loses both legs. Am I guilty of a crime, and must I make compensation to the widow and children of the man drowned and to the wounded child? Macaulay, in commenting upon his Indian Criminal Code, puts the case of a surgeon refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that, if it were not performed, the person who required it would die.

We may suppose again that the situation of imminent danger of death was created by the act, but the innocent act, of the person who refuses to prevent the death. The man, for example, whose eye was penetrated by the glancing shot of the careful pheasant hunter, stunned by the shot, fell face downward into a shallow pool by which he was standing. The hunter might easily save him, but lets him drown.

In the first three illustrations, however revolting the conduct of the man who declined to interfere, he was in no way responsible for the perilous situation, he did not increase the peril, he took away nothing from the person in jeopardy, he simply failed to confer a benefit upon a stranger. As the law stands today there would be no legal liability, either civilly or criminally, in any of these cases. The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not.

But ought the law to remain in this condition? Of course any statutory duty to be benevolent would have to be exceptional. The practical difficulty in such legislation would be in drawing the line. But that difficulty has continually to be faced in the law. We should all be better satisfied if the man who refuses to throw a rope to a drowning man or to save a helpless child on the railroad

track could be punished and be made to compensate the widow of the man drowned and the wounded child. We should not think it advisable to penalize the surgeon who refused to make the journey. These illustrations suggest a possible working rule. One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death. The case of the drowning of the man shot by the hunter differs from the others in that the hunter, although he acted innocently, did bring about the dangerous situation. Here, too, the lawyer who should try to charge the hunter would lead a forlorn hope. But it seems to me that he could make out a strong case against the hunter on common law grounds. By the early law, as we have seen, he would have been liable simply because he shot the other. In modern times the courts have admitted as an affirmative defense the fact that he was not negligent. May not the same courts refuse to allow the defense, if the defendant did not use reasonable means to prevent a calamity after creating the threatening situation? Be that as it may, it is hard to see why such a rule should not be declared by statute, if not by the courts.

It is obvious that the spirit of reform, which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its perfect work. It is worth while to realize the great ethical advance of the English law in the past, if only as an encouragement to effort for future improvement. In this work of the future there is an admirable field for the law professor. The professor has, while the judge and the practicing lawyer have not, the time for systematic and comprehensive study and for becoming familiar with the decisions and legislation of other countries. This systematic study and the knowledge of what is going on in other countries are indispensable if we would make our system of law the best possible instrument of justice. The training of students must always be the chief object of the law school, but this work should be supplemented by solid contributions of their professors to the improvement of the law.

James Barr Ames.

THE FEDERAL ANTI-TRUST ACT AND MINORITY HOLDINGS OF THE SHARES OF RAILROADS BY COMPETING COMPANIES.

THE case of the Northern Securities Company¹ did not stop with deciding that the persons in control of the Great Northern and Northern Pacific Railway companies, in jointly promoting the organization of the Securities Company and causing to be transferred to it a majority of the shares of each of the rival railways, formed a combination in restraint of trade in violation of § 1 of the Anti-trust Act, but also decided, as the Government had contended in the bill and in all the arguments, that the vesting of a majority of the shares of the two roads in the Securities Company created a monopoly within the meaning of § 2 of the act. It is true that having come to the conclusion that § 1 had been violated, the judges devoted little space in their discussions to § 2. Enough was said, nevertheless, to show that they held that that section of the law, as well as the first, had been broken. Thus, in the opinion announcing the affirmance of the decree of the circuit court, the question was asked:

"Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the states, or with foreign states? *Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce?* Let us see what are the facts disclosed by the record."²

Having seen what the facts disclosed by the record were, this was the answer:

"In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the Act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, *and forbids attempts to monopolize such commerce or any part of it.*"³

¹ 193 U. S. 197.

² P. 320. The italics are the writer's.

³ P. 325. The italics are the writer's.

And in his concurring opinion Mr. Justice Brewer said:

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, *and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly.*"¹

At first it was thought by some that this case turned upon the narrow consideration that (as assumed) the alleged sale of the stocks of the two roads to the Securities Company was — to borrow from a distinguished lawyer's comment upon the decree when rendered by the circuit court — "merely colorable, and that in truth it was a device to the effect of enabling the transferors to retain their beneficial interest in the several railway companies while each of them renounced his individual voice and vote as a shareholder";² that if the transaction had been a real out and out sale — that is to say, if the Securities Company had been a real purchaser — the decision must have been different, since it was not to be supposed that in the passage of the Anti-trust Act Congress intended to put a limitation upon the right of a person, natural or artificial, to purchase property. But this theory was soon to be discredited in the case of *Harriman v. Northern Securities Company*,³ where the Supreme Court held that the decision in the *Northern Securities Company's* case would have been the same whether the Securities Company had acquired the shares of the Great Northern and Northern Pacific Railway companies merely as custodian or trustee for its promoters, or as an absolute purchaser in its own right; although in point of fact it did acquire them, the court went on to say, as a purchaser in its own right. So if there were ever any ground for doubting that the *Northern Securities Company's* case decided that the purchase of a majority of the shares of two competing interstate railroads by a third corporation creates a combination violative of § 1 of the act, and a monopoly violative of § 2, it was swept away by the decision in *Harriman v. Northern Securities Company*. It hardly needs to be added that if it is a violation of the law for a third corporation to buy a majority of the shares of two competing railroads, *a fortiori*, it must be so for one of such railroads itself to buy a majority of the shares of the other; for the lodging of a majority interest in the

¹ P. 363. The italics are the writer's.

² Sir Frederick Pollock, 17 HARV. L. REV. 154.

³ 197 U. S. 244.

stock of one of two competing roads immediately in the other would produce a more direct and, if anything, a more effective restraint upon competition between them than if a third corporation held majority interests in the stocks of both.

From this point it is an easy step to the conclusion that the purchase by one of two competing railroads of sufficient shares in the other to control and shape its affairs in the normal course of business, although less than a majority, is also a violation of the act.

No rule of law makes the control of a corporation depend upon the ownership of a majority of all its shares. On the contrary, the rule, of course, is that a majority in interest of the shareholders present at the corporate meetings from time to time govern the corporation. And it is notorious that many shareholders habitually neglect to attend corporate meetings, or take any part whatever in the affairs of the corporations of which they are members, and many others habitually hand over their votes to the dominant shareholder or group of shareholders. In this way the number of shares needed to control a corporation is reduced much below a majority of the entire issue: how much below is a question of fact to be determined in each particular case. Only in the ideal instance where all the shareholders might be expected to attend the corporate meetings would it hold true that a majority of all the shares of a corporation is required to control it. On all sides in the business world are instances where the control of a corporation is just as firmly held through the ownership of a large minority of its shares as through the ownership of a majority, and the knowledge that this is so is acted upon every day. In a recent inquiry by the Interstate Commerce Commission a member of a banking house, with probably as much experience in such matters as any other in the world, testified that even 29.59 *per centum* of the shares of a railroad corporation were generally sufficient to give control.¹ It is therefore perfectly evident that if control is shown to exist in fact, it is a mere non-essential, whether it exists by virtue of the ownership of a majority of the shares of the corporation or of a smaller number; and unless this is recognized and acted upon by the courts, as it has been by bankers and promoters of corporate combinations, the way to evade the decision, that the act of Congress reaches the form of monopoly resulting from the concentration of controlling stock interests in competing railroads in the same hands, is clear, simple, and certain.

¹ *In re Consolidations, etc.*, 12 Interst. C. Rep. 277, 293.

The notion that a combination or monopoly in violation of the act is not established unless it be shown that an actual majority of the shares of each of the competing railroads has been lodged in the same hands is founded, it seems probable, upon the erroneous theory that the determination of what number of shares held by one corporation in another is enough to vest the one with power to control the other is a question of law, and therefore one to be solved by a general rule applicable to all cases, whereas in truth it is a question of fact, and therefore one to be determined separately in each case as it arises. This view is supported by the decision of the Supreme Court in the *Pearsall* case.¹ There it was held that the laws of Minnesota forbidding any railroad corporation to consolidate with, lease, or purchase, or in any manner become owner of, or control any other railroad corporation, or any stock, franchise, rights, or property thereof, which owns a parallel or competing line, would be violated by the transfer of half the shares of the then recently reorganized Northern Pacific Railway Company to the shareholders of the Great Northern Railway Company in consideration of the latter company's guaranteeing the bonds of the former. The court said:

"As the Northern Pacific road also controls, by its own construction and by the purchase of stock, other roads extending from the Mississippi River to the Pacific Ocean, and operates as a single system an aggregate mileage of 4,500 miles, most of which is parallel to the Great Northern System, the effect of this arrangement would be to practically consolidate the two systems, to operate 9,000 miles of railway under a single management, and to destroy any possible advantages the public might have through a competition between the two lines."² . . .

"The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the state of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition."³

And yet a half of the shares of a corporation are not a majority, so how could the court have held that the transfer of half the shares of the Northern Pacific Company to the Great Northern Company "would be to practically consolidate the two systems," and that such a consolidation would "unavoidably result in . . . a

¹ 161 U. S. 646.

² P. 670.

³ P. 677.

monopoly," except upon the theory that what number of shares held by one railroad in a competitor will give the one sufficient control over the other to destroy competition between them and create a monopoly is not a question of law to be determined by a general rule applicable to all cases, but is a question of fact; and that if such control be proved to exist in fact in any given case, it is immaterial whether it results from the ownership of a majority of the shares of the subservient road or of a smaller number? For, if it were a rule of law that not less than a majority of shares would be deemed a controlling interest in such cases, a half would in principle come as far from satisfying the rule as a third or a fourth.

But if this much were accepted, the more difficult question would remain, Whether the purchase by a railroad of less than a controlling minority interest—in short, of any shares—in a competing line is also a violation of the act of Congress? If the act went no farther than to denounce contracts which completely destroy competition and monopolies which have been accomplished, it would need be conceded that in respect to its application to intercorporate stock ownership among railroads its limits had been reached in the proposition that it is violated if one of two competing railroads acquires sufficient shares of the other to control its affairs, though less than a majority. But the act goes very far beyond that. It reaches attempts to monopolize, though these never ripen into monopolies in fact.¹ It reaches every contract or combination "in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States,"² and these embrace not only contracts which totally suppress competition, but as well those which "prevent the free operation of competition," or, in the more common phrase, "necessarily tend to suppress competition."³ And of especial importance here, the Supreme Court has declared that contracts are illegal under the act, however partial the restraint which they impose upon competition, if the business affected is of a public character like transportation.⁴ In the case of the Trans-Missouri Freight Association, in reply to a contention that the association did not suppress competition but

¹ § 2.

² *Loewe v. Lawlor*, 208 U. S. 274, 297.

³ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 328, 331, 352.

⁴ *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; see also 21 HARV. L. REV. 62.

only reasonably restricted it, Mr. Justice Peckham, who delivered the judgment, quoted a passage from the opinion in *Gibbs v. Consolidated Gas Co.*,¹ containing the well-known statement, "In the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy," and then went on to say:

"The above extract from the opinion of the court [in the *Gibbs* case] is made for the purpose of showing the difference which exists between a private and a public corporation — that kind of a public corporation which while doing business for remuneration is yet so connected in interest with the public as to give a public character to its business — and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that *any* restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests."²

No strained construction is required to bring within the broad purview of the act of Congress as thus defined the purchase of shares — that is, any shares — in one of two competing railroads by the other. The purchase of the shares of one railroad corporation by another is, of course, a contract, a contract of sale,³ the effect of which is to make the one road a part owner, beneficially, of the property of the other, and to give it a voice in the other's management. If the two roads are competitors, the necessary tendency of the contract is to put an end to competition between them, because the proprietors of the one having become by virtue of the contract the proprietors of the other, in part at least, the motive for competition is either destroyed or greatly weakened. The force with which this tendency will make itself felt may range all the way from a mere restraint or restriction upon competition to the point where competition is crushed completely and a monopoly substituted, according as the shares which the one road has acquired in the other are few or many. But, as shown, whether

¹ 130 U. S. 396, 408.

² P. 334. The italics are the writer's.

³ *Lurton, J., in Marble Co. v. Harvey*, 92 Tenn. 115; *Speer, J., in Langdon v. Branch*, 37 Fed. 449.

the result be the restriction of competition or its complete destruction, the contract, under the rulings of the Supreme Court,¹ is one in restraint of trade under § 1 of the Anti-trust Act, because its necessary tendency is to suppress competition, and because also, the business affected being of a public character, the law will not suffer it to be restrained to any extent whatever. If it be said that there might be instances where the shares so acquired by one competing road in another would be so few that the effect upon competition could not be measured, the answer is ready: "courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."² And how could any other answer be thought of? For if it were attempted to draw the line just where the one road's holdings in the other would begin to affect competition between them, an issue impracticable of solution would arise under the weight of which the enforcement of the law at this point would necessarily break down.

In a recent opinion the Interstate Commerce Commission recognized the fact that the holding of any shares of one of two rival railroads by the other is bound to restrict competition between them, for it took occasion there to say that "so long as it is the policy of the general government and of the states to maintain competition between naturally competing lines, the ownership of *any* stock by one railway in a competing railway should not be permitted."³

So far it has been as a contract in restraint of trade that we have viewed the purchase of shares by a railroad in a competing line. Consequently nothing has yet been said of the intent back of the purchase, because it seems settled by judgments of the Supreme Court that a specific intent to restrain or monopolize trade is not an essential ingredient of any of the offenses created by the Anti-trust Act (excepting, of course, attempts to monopolize), and is therefore not material where, as must be the case with the purchase of shares of one of two competing railroads by the other, the certain and natural effect of the contract is to suppress or tend to suppress competition in commerce,⁴ and becomes mate-

¹ *Loewe v. Lawlor*; *Northern Securities Co. v. U. S.*; and *U. S. v. Trans-Missouri Freight Ass'n*, *supra*.

² *Salt Co. v. Guthrie*, 35 Oh. St. 666, 672.

³ *In re Consolidations and Combinations of Carriers, etc.*, 12 Interst. C. Rep. 277, 305.

⁴ *U. S. v. Trans-Missouri Freight Ass'n*, *supra*; *U. S. v. Addyston Pipe Co.*, 175 U. S. 211.

rial only where the contract or other act is by itself equivocal or uncertain in its bearing upon commerce; and it is then material, not as an element of the offense, but as evidence to show that the act does or does not produce the forbidden result, either alone or as part of a plan. *Shawnee Compress Co. v. Anderson*¹ is an instance where evidence of a specific intent to suppress competition brought an act otherwise equivocal and of uncertain significance within the law's inhibition, while in *Anderson v. United States*² an innocent intent had the reverse effect.

When, however, it is shown that the shares in the competing line are bought with the specific intent to break down or weaken its rivalry, the transaction, in addition to being a contract in restraint of trade, becomes an attempt to monopolize, a distinct offense. And if in any case such intent cannot be shown by direct evidence, it will be presumed, for when a corporation chartered to operate a railroad, and therefore supposed to devote its capital to that purpose, buys and holds in its treasury shares of another line, not an extension or feeder of its own, but in active competition with it, it will not be heard to deny the only logical inference to be drawn from its action.

The conclusion thus reached, that it is a violation of the Anti-Trust Act, because destructive of competition and promotive of monopoly, for one of two competing railroads to acquire any shares of the other, is strongly fortified by the authorities declaring the same thing to be contrary to the common law,³ since not only is that "the system from which our legal definitions are derived,"⁴ but in respect to this particular subject matter Congress has made the common law, with widened scope, the very law of the United States.

In the first of the cases referred to,⁵ in which the right of the appellant company to purchase either the stock or the property and franchises of a competing line was drawn in question under a section of the Constitution of Kentucky prohibiting any railroad to

¹ 209 U. S. 423.

² 171 U. S. 604.

³ *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677; *Central R. R. Co. v. Collins*, 40 Ga. 582; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *Milbank v. N. Y., L. E. & W. R. R. Co.*, 64 How. Pr. 20; *Pearson v. Concord R. R. Co.*, 62 N. H. 537; *Memphis & Charleston R. R. Co. v. Woods*, 88 Ala. 630; *Noyes, Intercorporate Relations*, § 292; *Cook, Stock and Stockholders*, § 315.

⁴ *Bradley, J.*, in *Moore v. U. S.*, 91 U. S. 270, 274.

⁵ *Louisville & Nashville R. R. Co. v. Kentucky*, *supra*.

consolidate its stock with, or acquire by purchase, lease, or otherwise, any railroad owning a parallel or competing line, the Supreme Court declared:

"Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, *but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void.* Cook, Stock & Stockholders, § 315; Central R. R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah, G. & N. A. R. R. Co., 43 Ga. 13; Elkins v. Camden & A. R. R. Co., 36 N. J. Eq. 5. The doctrine is peculiarly applicable to this case, in which it is shown that the Chesapeake Company was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining competition with the Louisville & Nashville Company, — a purpose which would, of course, be defeated by a combination with it. This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States, — a policy which has not only found a place in the statute law of such States as apprehended evil effects from such consolidations, *but has been declared by the courts to be necessary to protect the public from the establishment of monopolies.* Indeed, the unanimity with which the states have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible."¹

It is to be noticed that the court says here that while the purchase of shares in one railroad by another not a competitor, in the absence of express authority, is held to be beyond the power of that particular railroad but nothing worse, the purchase of shares in one railroad by another which is a competitor is held to be not only beyond the power of the particular railroad but contrary to public policy and void, that is, contrary to general law, common or statute. We are to observe, too, that this consequence follows whatever the number of shares so purchased, for the words of the court are that the "purchase of stock" in a competing line is held to be contrary to public policy, and by a familiar rule the word "stock" as used here without any qualification as to amount must be assumed to mean any stock. Moreover, the context itself

¹ P. 698. The italics are the writer's.

excludes any other meaning. It is the same "purchase of stock in another company" (in kind and quantity) which the court speaks of as being beyond the power of a railroad corporation unless expressly authorized, and as being, in addition, contrary to public policy where the other line is a rival and competing line. That is to say, whatsoever purchase of stock in another company is beyond the power of a railroad corporation is also contrary to public policy where the other company is a competitor. And it is settled law that the purchase of any stock — not some particular amount — by one railroad in another is beyond its power unless authorized. But to go back, why is the transaction contrary to public policy when the roads are competitive and not when they are non-competitive? Obviously for no other possible reason than this, that, as stated in the cases cited by the court, where the roads are competitive the purchase by one of shares in the other tends to suppress competition between them and to create a monopoly; which is the reason pointedly recognized by the court itself when it goes on to say of the doctrine which it had just announced, that it "is peculiarly applicable to this case, in which it is shown that the Chesapeake Company was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining *competition* with the Louisville & Nashville Company, — a purpose which would, of course, be defeated by a combination with it."¹ From the declaration under discussion, therefore, the principle is deducible that the purchase of any shares in one railroad by another which is a competitor is contrary to public policy, because, by destroying in whole or in part, depending upon the number of shares so acquired, and for a period of indefinite duration, the free agency of the road whose stock is purchased, it restrains if it does not extinguish competition between the two. And, of course, where the roads are engaged in interstate commerce the public policy violated is that of the United States as expressed in the Anti-trust Act.

Important also is the clause toward the end of the quotation, in which the court speaks of the restriction in the Kentucky Constitution upon the consolidation of railroads, which it was construing, namely, that "no railroad shall consolidate its *capital stock*, franchises, or property, . . . *in whole or in part*, with any other railroad . . . owning a parallel or competing line," as "a policy which has not only found a place in the *statute* law of such states as appre-

¹ The italics are the writer's.

hended evil effects from such consolidations, *but has been declared by the courts* to be necessary to protect the public from the establishment of monopolies.”¹ This remark can only mean that the purchase by one of two competing railroads of shares in the other or of the property of the other is not only a violation of the statutes and constitutional provisions which specifically prohibit any railroad to purchase stock in, or acquire by purchase, lease, or otherwise, a competing line, but is also declared by the courts to be a violation of the general inhibitions of the common law against contracts, combinations, or other arrangements which directly promote monopolies, and necessarily therefore a violation of statutes embodying such inhibitions of the common law; as, for example, the federal Anti-trust Act.

If it be said that the declaration which has been under discussion is not decision but only a dictum, it is at any rate the dictum of the Supreme Court. And as Mr. Justice Harlan observed in the Northern Securities Company's case, propositions of law laid down in former decisions of the Supreme Court “cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*” if “what was said in those cases was within the limits of the issues made by the parties,”² as undoubtedly it was in the case under consideration.

In *Central Railroad Co. v. Collins*,³ cited by the Supreme Court in the case just left, the Central Railroad and Banking Company and the Southwestern Railroad Company, corporations of Georgia, had effected a joint purchase from the city of Savannah of 12,383 of the 36,912 shares of a competing line, the Atlantic & Gulf Railroad Company, also a corporation of Georgia. They held no other shares in that company beside these. Certain minority shareholders of the several roads concerned who objected to the transaction brought a bill in equity to cause a rescission of the purchase on the grounds that it was beyond the powers granted in the charters of the companies making the purchase, and that it was contrary to the public policy of the state — contrary to public policy because it restricted competition between rival railroads. The Supreme Court of Georgia decided that on both of the grounds put forward by the complainants it was unlawful for the Central and Southwestern Railroad companies, or either of them, to hold the shares which they had acquired in the Atlantic & Gulf Railroad Company.

¹ The italics are the writer's.

² 193 U. S. 197, 332.

³ 40 Ga. 582.

On the point that such shareholding was unlawful because its necessary tendency was to destroy competition between rival railroads, the court said:

"Thus far we have considered this question solely in reference to the right of a stockholder to insist upon it that the company shall not violate his rights by compelling him, against his will, to become a partner in an enterprise not contemplated in the contract. But the stockholder has a right to insist upon it, that the funds of the company, in which he has an undivided interest, shall not be used in violation of the public policy of the State. . . .

"... It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise and success to railroads as to other human undertakings. It has been the conflict with thirty State lines, each with its opposing interests, and with numerous seaboard cities, each seeking to attract the rich outpourings from the great interior, that has begotten the mighty network of iron which interlaces our extensive territory, and I am convinced that there is no public policy more striking than that which, whilst it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies."¹

In a concurring opinion the Chief Justice added:

"... It follows that there is no public policy of the State recognizing the right or power of the Central Road to lease or otherwise control the Atlantic and Gulf Road.

"But on the contrary, the public policy of this State, as clearly shown by its legislation, is to encourage fair and just competition, between the different railroad companies of the State, and to discourage monopolies."²

While from some general expressions of the judges it can be seen that it was in their minds that if the Central Railroad should hold these 12,383 of the total 36,912 shares of the Atlantic & Gulf Railroad it would in all probability, with the aid of other stockholders or by the purchase of additional shares, eventually gain absolute control over the subservient road, it is yet nowhere stated or implied in the opinions that the decision that the transaction violated public policy because promotive of monopoly depended upon the number of such shares so held by the Central road being a controlling interest. Nor could it have been made to depend upon that condition, for the simple reason that the question of fact

¹ P. 628.

² P. 640.

whether 12,383 did or did not constitute a controlling interest in the shares of the Atlantic & Gulf road was not determined. Necessarily, therefore, the decision must have proceeded, as the logic of the reasoning employed quite plainly imports, upon the broader principle that it is against public policy to permit a railroad to hold shares in a competing line regardless whether the number so held be a controlling fraction or less; and that the courts and text-writers have so construed it is shown by the circumstance that it is invariably cited in support where that principle is announced.¹

In *People v. Chicago Gas Trust Co.*² it appeared that the Chicago Gas Trust Company had been created under the general incorporation law of Illinois providing for the organization of corporations "for any lawful purpose," its articles of incorporation declaring one of its purposes to be "to purchase and hold or sell the capital stock . . . of any gas-works or gas company or companies . . . in Chicago . . . or elsewhere in . . . Illinois." The contention of the State, which the court sustained, was that this was not a "lawful purpose," as the carrying out of it might lead to the creation of a monopoly of the manufacture and sale of gas in the city of Chicago. And in fact the defendant company had acquired a majority of the stock of four other gas companies in Chicago, thus effecting an absolute monopoly of the gas supply of that city; and this circumstance, illustrating strikingly as it did the danger of conceding to such corporations the power to purchase shares of stock in one another, naturally assumed a prominent place in the discussions of the court. The actual judgment, however, which was rendered on a demurrer to defendant's pleas, did not depend upon this circumstance, but covered the broader ground, that to purchase shares of the capital stock — that is, any shares, whether a majority or not — of competing gas companies was not a "lawful purpose" for which to organize a corporation, as the execution of such a purpose would necessarily tend to suppress competition and create a monopoly in a business of a public character. This is evident from many expressions in the opinion of the court; for example, this:

¹ See *Louisville & Nashville R. R. Co. v. Kentucky*, *supra*; *People v. Chicago Gas Trust Co.*, *supra*; Noyes, *Intercompany Relations*, *supra*; Cook, *Stock and Stockholders*, *supra*; note, 18 L. R. A. 253; article in 32 Amer. Law Reg. 1055; article in 27 Amer. Law Rev. 341.

² 130 Ill. 268.

"It may be here stated, as showing the policy of the State to be against the purchase by one gas company of stock [not any particular amount] in other corporations, that the power to purchase such stock is not granted in any of the more than fifty special charters above named."¹

The court, indeed, expressly stated at the beginning of its opinion that this broader question was before it.²

The denial of power in the defendant company to purchase and hold shares of the capital stock of other gas companies was thus the gravamen of the decision. The fact that in this particular case the defendant company had exercised the power to the extent of acquiring a majority of the shares of other companies was a persuasive but not the controlling factor. This decision, therefore, squarely supports the proposition that the acquisition by one of two or more corporations, engaged competitively in a business impressed with a public interest, of shares in either of the others is forbidden by public policy, as declared in the common law (there was no statute on the subject in Illinois when this case was decided), because it would tend to suppress competition and create monopoly. And it is cited as a leading authority to this effect by Judge Noyes in his treatise on Intercorporate Relations,³ and by other text-writers.

From this review of leading cases it appears that at common law, in this country at any rate, it is not merely *ultra vires* but also contrary to public policy, because destructive of competition and promotive of monopoly, for a railroad to acquire shares of the capital stock of a competing company. And if such a thing violates the common law it violates also the law of the United States, when the railroads are interstate lines, regardless whether the common

¹ P. 298.

² "The first, third and seventh pleas aver that the defendant uses and exercises 'the power, liberty, privilege and franchise of purchasing and holding the capital stock of gas companies in the State of Illinois,' and that, in such use and exercise thereof, 'it has purchased and still holds *capital stock* of the four gas companies,' etc., without stating how much capital stock it holds. The demurrer to these pleas might well have been sustained on the ground that they do not answer the information. The information charges that the defendant has purchased and holds a majority of the shares of stock in each of the four companies, while the pleas answer by saying that defendant holds 'capital stock,' and do not set forth whether the stock so held is a majority or less than a majority of the shares. If it be conceded, however, that the three pleas are not defective for the reason thus specified, they present the question whether appellee can lawfully purchase and hold shares of stock in other gas companies, the number of such shares being less than a majority, and, therefore, too small to give a controlling interest in such other companies." P. 281.

³ § 292.

law in general is or is not a part of the law of the United States as a body politic distinct from the several States; for in the Anti-trust Act Congress has with respect to interstate commerce enacted into the statute law of the United States all the inhibitions of the common law against agreements, combinations, and monopolies in restraint of trade, and more besides. So recently as in *Loewe v. Lawlor*,¹ the Supreme Court, answering the contention in that case, that "even conceding that the declaration states a case good at common law . . . it does not state one within the statute," declared that "*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; *United States v. Joint Traffic Ass'n*, 171 U. S. 505; and *Northern Securities Co. v. United States*, 193 U. S. 197, hold in effect that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law."

Thus, whether we look to the terms of the act of Congress itself, or whether, knowing the prohibitions of the common law against restraints of trade to be if anything less wide than those of the act, we turn to the precedents of the common law, the conclusion arrived at is the same.

G. Carroll Todd.

NEW YORK.

¹ 208 U. S. 274, 296, 297.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1897-8	1898-9	1899-1900	1900-01	1901-02	1902-03
Res. Grad. . . .	1	1	—	1	1	—
Third year . . .	130	102	134	144	149	167
Second year . . .	157	169	193	202	190	196
First year . . .	216	218	232	241	229	228
Specials	41	58	51	58	59	49
	545	548	610	646	628	640

	1903-04	1904-05	1905-06	1906-07	1907-08	1908-09
Res. Grad. . . .	4	1	1	—	2	—
Third year . . .	180	182	192	190	171	169
Second year . . .	201	232	216	199	198	207
First year . . .	293	285	243	243	280	244
Specials	60	58	64	62	63	64
	738	758	716	694	714	684

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93
1911	35	5	18	58

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153
1911	26	29	104	159

Class of	HOLDING NO DEGREE.			Total.	Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.		
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280
1911	12	1	14	27	244

As the twenty-seven Harvard seniors in the first year class have in each instance completed the work required for the A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the sixty-four special students, nineteen have entered this year, and of these fourteen are graduates of a college or university, three having received a degree in law and two being admitted by examination.

One hundred and twenty colleges and universities have representatives now in the School as compared with one hundred and twenty-one last year and one hundred and twenty-two the previous year. In the first-year class sixty-six colleges and universities, as compared with sixty-eight last year, are represented, as follows: Harvard, 85; Yale, 25; Princeton, 13; Brown, 8; Bowdoin, Dartmouth, 7; Holy Cross, Tufts, 6; California, 5; Amherst, 4; Boston College, Colorado College, Cornell College, Lafayette, Michigan, Williams, 3; Beloit, Catholic University, Hamilton, Johns Hopkins, Kentucky State University, Minnesota, Nebraska, North Carolina, Ohio Wesleyan, Park, Pomona, Trinity (Conn.), Wooster, 2; Alabama Polytechnic Institute, Antioch, Baker, Bucknell, Central, Chicago, Columbia, Cornell University, DePauw, Drury, Emory, Fisk, Georgia, Hobart, University of Illinois, Indiana, Knox, Leland Stanford, Jr., Mercer, Monmouth, Northwestern, Notre Dame, Oklahoma, Oxford, Pacific, Southern California, Trinity (N. C.), Tulane, Union, Vanderbilt, Vermont, Wabash, Washington & Jefferson, Western Maryland, Western Reserve, Wofford, Yankton, 1. There are at present in the School eight law school graduates, three of whom hold academic degrees also, representing the law schools of the following universities: Alabama, Boston, Boston Y. M. C. A., Dalhousie, George Washington, Illinois, Northwestern.

INDEMNITY FOR THE LIABILITY FOR A TORT COMMITTED AT ANOTHER'S REQUEST. — If an agent, in obedience to the orders of his principal, unconsciously commits a tort against a third person, the principal is bound to indemnify or reimburse him for the liability or loss he incurs.¹ But if the agent is not innocent, he has no such right of reimbursement.² This duty of the principal, it would seem, is not necessarily based on a contract, express or implied, but is a quasi-contractual obligation arising out of the agency relation.³ When a judgment creditor, for instance, expressly directs a sheriff to attach certain goods which, it later appears, do not belong to the judgment debtor, he makes the sheriff his agent *pro tanto*, and is bound to indemnify him against any liability he incurs for the wrongful levy.⁴ If, however, there is no such express direction, the sheriff has no right to indemnity, in the absence of an express agreement, since he is not then acting as an agent but independently.⁵

In another class of cases where the relation of principal and agent does not exist there may nevertheless be a right to indemnity based, not on quasi-contractual grounds, but on a promise implied in fact, the intent being gathered from all the circumstances.⁶ Such a promise to indemnify against liability may frequently be implied when one person acts at the request of another.⁷ While the American cases treat the question whether a promise is fairly to be implied from the request as one of fact, in England the courts have gone further, and, as a matter of law, have imposed an obligation to indemnify when the plaintiff at the defendant's request exercises a statutory or common law duty for the benefit of the defendant, and thereby innocently incurs a liability to a third party.⁸

As to what constitutes a request, and when the promise is to be implied, the cases furnish no clear test. In a recent case a broker identified a woman as the owner of certain shares of stock, and the plaintiff thereupon, at her request, registered a transfer of them. She was in fact fraudulently impersonating the true owner, but the broker had no reason to suspect that fact and he received nothing except a nominal fee for his trouble. It was held that he had impliedly requested the transfer and was bound to reimburse the plaintiff for its outlay in the purchase of new stock for the true owner. *Bank of England v. Cutler*, [1908] 2 K. B. 208. It is difficult to support the decision. Except in the anomalous cases of implied warranty of quality and title in the law of sales and of implied warranty by an agent of his authority in the law of agency,⁹ one is not liable for an innocent misrepresentation, even though he knows and intends that the representation will be acted upon.¹⁰ And from the mere misrepresentation innocently made, a request to make the transfer can hardly be inferred. To imply a request by

¹ *Greene v. Goddard*, 9 Met. (Mass.) 212; *Howe v. Buffalo, etc., R. R. Co.*, 37 N. Y. 297.

² *Mohr v. Miesen*, 47 Minn. 228.

³ See *MECHEM, AGENCY*, § 653.

⁴ *Higgins v. Russo*, 72 Conn. 238.

⁵ *Russell v. Walker*, 150 Mass. 531.

⁶ *Dugdale v. Lovering*, 10 C. P. 196. See *King v. U. S.*, 1 Ct. Cl. 38.

⁷ See *Birmingham, etc., Co. v. Ry.*, 34 Ch. D. 261.

⁸ *Sheffield Corporation v. Barclay*, [1905] A. C. 392.

⁹ *Collen v. Wright*, 8 E. & B. 647.

¹⁰ A defendant is not liable in deceit unless he made a misrepresentation knowing it to be false or without honest belief in its truth. *Derry v. Peek*, 14 A. C. 337. As to liability for misrepresentations negligently made, see 14 HARV. L. REV. 184; 21 *ibid.* 439.

the defendant which under the English law will result in an obligation to indemnify regardless of his intent, express or implied, there should at least be an anticipated benefit. And this would seem to be the rule in the previous English decisions.¹¹ Also in this country where, except in the cases of agency, there must be a promise to indemnify implied in fact, it would in general seem unfair to infer such a promise, unless the defendant expects to get some benefit from the act of the plaintiff.

POWER OF THE JUDICIARY OVER CONTROVERSIES INVOLVING POLITICAL QUESTIONS. — Since the time of Littleton it has been established law that the decision of political questions is without the province of the courts.¹ But a difficulty arises in determining what are political questions. In this country they would seem to be questions expressly reserved by the Constitution to either the executive or the legislature, and questions which are by the necessary implication of the Constitution so reserved — that is, questions the decision of which by the judiciary would obviously embarrass the action of the executive and legislature within their respective spheres, or which, owing to the superior sources of knowledge of the other two branches, the courts are ill-qualified to decide. Among such are questions as to the jurisdiction of different sovereignties,² the duly constituted government of a state,³ and the status of Indian tribes.⁴

A crucial issue arises where a court is called upon to determine the rights of individuals to property within its jurisdiction when the decision necessarily involves the determination of a political question. As to international questions it is a well-settled rule of international law that municipal courts may determine the title to property situated within their jurisdiction, even though a political question is involved.⁵ Accordingly, a foreign sovereign having property within the jurisdiction is amenable to the court's control, since by becoming the owner of the property he has incorporated himself into the juridical system under which he holds it and since a suit against him can be carried on without interfering in any way with any property necessary to the proper discharge of his functions as a sovereign.⁶ In accord with this rule is the opinion of a recent case in India which confirms the right of the courts of British India to adjudicate the title to property situated therein belonging to a native prince not subject to the court's jurisdiction, in spite of the fact that the rules governing the descent of the property were the same as those governing the succession to the throne. But, on finding that the real object of the suit was to settle the succession, and that the property right involved was only contingent, the court denied its jurisdiction. *Shamarendra Chandra Deb Barman v. Birenda Kishore Deb Barman*, 12 Calcutta W. N. 777 (Calcutta High Ct., May 21, 1908).

Similarly the United States Supreme Court has held that a mere assertion of property rights will not give jurisdiction over a political question where

¹¹ *Carshore v. Ry.*, 29 Ch. D. 344; *Sheffield Corporation v. Barclay*, *supra*.

¹ Wambaugh's *Littleton's Tenures*, Introd. xxxiv, xxxv.

² *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 839; *State v. Wagner*, 61 Me. 178; *Foster v. Neilson*, 2 Pet. (U. S.) 253.

³ *Luther v. Borden*, 7 How. (U. S.) 1.

⁴ *Farrell v. U. S.*, 110 Fed. 942, 951.

⁵ *Neel Kisto Deb v. Beer Chunder*, 12 Moore's Ind. App. 523, 534.

⁶ *The Charkieh*, L. R. 4 Ad. & Ecc. 59, 97.

the assertion is merely added for the purpose of giving jurisdiction.⁷ Accordingly, it would appear necessary that the property rights be not remote. Yet the Supreme Court held in a leading case that in boundary disputes between the states, the state's right of escheat to the property within its borders is a sufficient property right to render the question one for the judiciary, and that the sovereignty and jurisdiction of the states is merely incidental to the property rights involved.⁸ The English cases relating to counties palatine⁹ and to colonial governments¹⁰ are cited as authority for this position. But in those cases the English courts had jurisdiction, not of causes between states, but of causes arising out of agreements between English subjects, who, when residing within the jurisdiction of the English courts, were, as English subjects, amenable to the processes of those courts. It is further reasoned¹¹ that a political question becomes a judicial one when submitted to the courts; but this reasoning should not have been applied where the defendant state submitted to the court's process by appearing and pleading, and then later moved a dismissal for want of jurisdiction.¹² The decision of the Supreme Court that its jurisdiction extends over boundary disputes between the states is settled law.¹³ It is submitted, however, that the dissenting opinion of Chief Justice Taney¹⁴ in the leading case contains the preferable view — that such disputes are political questions where the suit is not brought to try a right of property in the soil, but is rather brought to enforce the mere political jurisdiction of the state.

DISTRIBUTION OF THE PROCEEDS OF SECURITIES OF DIFFERENT CLASSES OF CUSTOMERS WRONGFULLY PLEDGED BY A BROKER. — It is the practice for a broker buying shares of stock on margin for a customer to have them registered in his own name, and he is impliedly authorized to pledge them to an amount not greater than that due him from his principal.¹ Similarly he has power to hypothecate shares indorsed to him in blank as collateral for an advance.² If he sells the stock or pledges it to an amount greater than his principal's obligation, without having in his possession or under his control other stock of the same description to replace it, he is guilty of a conversion.³ Most courts, following New York, describe the relation of the broker to his customer as that of pledgor and pledgee.⁴ The Massachusetts cases hold that only a contractual relation is established.⁵

⁷ *Georgia v. Stanton*, 6 Wall. (U. S.) 50.

⁸ *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 734. See also *Georgia v. Stanton*, *supra*.

⁹ *Derby v. Athol*, 1 Ves. 201; *Bishop of Sodor and Man v. Derby*, 2 Ves. 337, 355.

¹⁰ *Penn v. Baltimore*, 1 Ves. 446; *Nabob of the Carnatic v. E. India Co.*, 1 Ves. Jr. 370.

¹¹ *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 737.

¹² *Cf. ibid.* 719.

¹³ *New York v. Connecticut*, 4 Dall. (U. S.) 4; *New Jersey v. New York*, 5 Pet. (U. S.); 284; *U. S. v. Texas*, 143 U. S. 621; *Virginia v. West Virginia*, 11 Wall. (U. S.) 39, 53; *Mississippi v. Louisiana*, 202 U. S. 1. See also 16 HARV. L. REV. 134.

¹⁴ *Rhode Island v. Massachusetts*, *supra*, 752, 754.

¹ *Skiff v. Stoddard*, 63 Conn. 198.

² *Lawrence v. Maxwell*, 53 N. Y. 19. It is hardly necessary to add that a stock-broker is guilty of a conversion if he hypothecates stock which he holds as bailee. *Tomkins v. Morton Trust Co.*, 91 N. Y. App. Div. 274.

³ *Tausig v. Hart*, 58 N. Y. 425; *Douglas v. Carpenter*, 17 N. Y. App. Div. 329. For a discussion of this point, see 5 Am. Lawyer 573.

⁴ *Markham v. Jaudon*, 41 N. Y. 235; *Skiff v. Stoddard*, *supra*.

⁵ *Covell v. Laud*, 135 Mass. 41. For a discussion of the relation existing between broker and principal in margin transactions, see 19 HARV. L. REV. 529.

Under the former view an interesting question arises as to the rights of the parties when a broker, before his insolvency, has pledged stock of his own, together with that of his customers, to a *bona fide* pledgee for value. It must be clear that the parties are estopped to deny the right of the pledgee to be protected to the extent of his loan, since he has changed his position in good faith, relying on the apparent title of the broker.⁶ It is submitted that the relation of the parties is analogous to that of a suretyship. The subpledgee may on default of his principal look to the securities for satisfaction of his claim, and the owners of the securities in turn have a right of reimbursement against the broker.⁷ If the owners of the stock all stand in the same relation to the broker — for example, if they have all deposited stock with him as collateral for advances — the problem becomes a simple one of suretyship. Equity will see that the securities are applied by the subpledgee *pari passu* in payment of his loan.⁸ And if the subpledgee in ignorance of the claim of the true owners sells the securities belonging to one, leaving the others' undisposed of, it will be decreed that they be sold and the proceeds so applied that the burden of the loss be borne proportionately by all, in accordance with the right of a surety to seek contribution from his co-sureties.⁹

A more difficult question arises where the parties whose securities have been wrongfully pledged do not stand on the same footing. Such is the case where a broker pledges, wrongfully as before, his own stock together with that of A which he held for sale or as a simple bailee, that of B which he held as collateral for advances, and that of C, purchased on margin. A recent New York case, following an earlier decision,¹⁰ held that after the *bona fide* pledgee had satisfied his claim out of the proceeds of a sale of the securities, A was entitled to priority on what remained for the entire value of his stock. *Matter of Mills*, 39 N. Y. L. J. 761 (N. Y., App. Div., May, 1908). This, it is submitted, is correct on principle. It must be presumed that the broker intended that his own securities should be applied before recourse was had to the stock of the co-sureties;¹¹ and though the broker has been guilty of a conversion as to A, B, and C, yet A, who did not impliedly authorize re-hypothecation, should have a right in equity to demand that the subpledgee first apply to the satisfaction of his claim stock authorized to be repaid.¹²

RESCISSION OF INSURANCE CONTRACTS WITHOUT RESTITUTION. — It is a general rule that there can be no rescission of a contract unless the parties can be put in *status quo*.¹ The right to rescind is equitable, and since equity will not permit a forfeiture the rescinding party must restore anything he has

⁶ *McNeil v. Tenth Nat'l Bank*, 46 N. Y. 325.

⁷ *McNeil v. Tenth Nat'l Bank*, *supra*; *Farwell v. Importers Nat'l Bank*, 90 N. Y. 483; *Smith v. Savin*, 141 N. Y. 315.

⁸ *Skiff v. Stoddard*, *supra*, 225, 226.

⁹ *Gould v. Central Trust Co.*, 6 Abb. N. C. (N. Y.) 381. See *Colebrook, Collateral Securities*, 326; *Jones, Pledges*, 512.

¹⁰ *Willard v. White*, 56 Hun (N. Y.) 581.

¹¹ *Myers v. Merchants Nat'l Bank*, 16 N. Y. Supp. 58; *Le Marchant v. Moore*, 150 N. Y. 209; *Smith v. Savin*, *supra*.

¹² *Skiff v. Stoddard*, *supra*; *Willard v. White*, *supra*; *Harmon v. Sprague*, 163 Fed. 486; *Tompkins v. Morton Trust Co.*, *supra*.

¹ *Byard v. Holmes*, 4 Vroom (N. J.) 119; *Gay v. Alter*, 102 U. S. 79; *Handforth v. Jackson*, 150 Mass. 149.

received under the contract. If it is impossible to make the other party whole there can be no rescission,² and that is so, except in one class of cases, whether the right to rescind arose through fraud or otherwise.³ A long line of insurance cases, however, has decided differently.⁴ In a recent case, for instance, the plaintiff was induced to continue a policy of life insurance by the fraudulent representation of the insurer's agent that if he paid the premiums for four more years, he would then hold a fully paid-up policy. At the end of the four years the plaintiff discovered the fraud, elected to rescind, and sued for the amount of the premiums paid. The court allowed full recovery. *Kettlewell v. Refuge Assurance Co.*, 24 T. L. R. 216 (Eng., Ct. App., June 10, 1908).

If a policy of insurance is void at the outset without fault of the insured, there is no difficulty in his recovering in the ordinary action for money had and received on a consideration failed, because, as there could have been no enforcement of the policy, the insurer has been under no risk. But a contract induced by fraud is merely voidable at the option of the defrauded party, and where that is the only ground for rescission there is no failure of consideration, since the insurer has been carrying the risk or furnishing insurance; for it would have been liable for the full amount of the policy if the insured had died before electing to rescind.⁵ As the insurer has given consideration it must therefore be indemnified for the risk incurred, or else there should be no rescission. This seems to be the rule in the analogous case of a policy issued to an infant. Infancy, like fraud, makes the contract voidable at the infant's election. It is accordingly held that the infant cannot rescind without compensating the insurer for his risk, on the ground that the carrying of insurance, even subject to the insured's option, is a consideration for which the insurer is entitled to compensation.⁶ Theoretically, the nature of insurance is such that it is impossible to determine the value of the particular risk the insurer has assumed. Practically, the growth of the insurance business has resulted in such close calculations of the value of every sort of insurance that it is almost on the same basis for buying and selling as ordinary choses in action. It is therefore possible for the insured to restore the consideration he has received under the contract and when this is done rescission is allowable.⁷ It is unfortunate that in the case of fraud it seems to be definitely settled in most jurisdictions that the insured as in the principal case can recover the full amount of the premiums, with no deduction.⁸ These cases, failing to distinguish between void and voidable contracts, establish an anomalous exception to the general rule requiring restitution. They overlook the fact that rescission itself can be justified only when the parties are reinstated substantially in their original situation. The result is, the insured has had the benefit of insurance without paying for it while the insurer is penalized despite the equitable rule against forfeitures.

² *Bailey v. Fox*, 78 Cal. 389; *Todd v. McLaughlin*, 125 Mich. 268.

³ *Bailey v. Fox*, *supra*; *Buchenau v. Horney*, 12 Ill. 336.

⁴ *McCarty v. N. Y. Life Ins. Co.*, 74 Minn. 530. But see *Collins v. Townsend*, 58 Cal. 608.

⁵ *Continental Life Ins. Co. v. Houser*, 111 Ind. 266.

⁶ *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365. See also *City Sav. Bank v. Whittle*, 63 N. H. 587; *Rice v. Butler*, 160 N. Y. 578.

⁷ *Day v. Conn. Gen. Life Ins. Co.*, 45 Conn. 480.

⁸ *Hedden v. Griffin*, 136 Mass. 229; *Van Werden v. Equitable Life Ass'ce Soc.*, 99 Ia. 621; *Caldwell v. Ins. Co.*, 140 N. C. 100. See also *Butler v. Prentiss*, 158 N. Y. 49, 64, which seems to extend the doctrine.

THE DOCTRINE OF ESTOPPEL BY DEED. — The modern doctrine of estoppel by deed is usually regarded as an offspring of the effect given to the feudal warranty in avoiding circuity of action.¹ Under modern methods of conveyancing the operation of the doctrine is, in England, probably restricted to leases,² but in America is extended to cover all cases of conveyance, so that if one purports to convey with covenant of warranty land to which he has no title but which he thereafter acquires, the grantee is forthwith legally vested with that title.³ Inasmuch, however, as this transfer is unaffected by the fact that the grantee's action on the covenant of warranty is barred,⁴ or that the truth as to the grantor's purported ownership appears on the face of the deed,⁵ the doctrine in its extension can no longer be based on an avoidance of circuity of action, or on the principle of strict estoppel.

There is, however, in many cases an equitable basis for the result in that the grantor, upon the subsequent acquisition of title which he previously purported to convey, has an estate to which another, his grantee, has a better right. However, it should always be recognized that in essence the cases on this general subject demand the application of equitable principles and that a court of law in entertaining them can be justified only as it reaches an equitable result.⁶ Recognition of the doctrine as a hard and fast rule of law has inevitably led to inequitable results. This is apparent in two classes of cases. First, when the question arises between grantor and grantee. If the doctrine is invoked as an invariable rule of law, title vests in the grantee, although he may prefer to recover for the breach of warranty.⁷ Further the grantor may purchase the land if it depreciates in value and force title on the grantee, or if the land appreciates, await the grantee's suit.⁸ That a grantor, primarily in default, should reap advantage from his own wrong is manifestly indefensible. Secondly, when the question arises between the grantee and privies of the grantor. It is clear that all privies of the grantor who are volunteers should be bound by the grantee's equity.⁹ But the rule is also applied against purchasers from the grantor, who have relied on the registry and the grantor's apparent title. Such a purchaser is thus defeated by the grantee of the former purported conveyance who claims that the title, when acquired by the grantor, immediately passes to him.¹⁰ Hence a purchaser must at his peril discover whether any grantor, in the chain of title, ever purported to convey the land in question, before his acquisition of it. Equitably, the *bona fide* purchaser who has searched the registry in the usual way should be protected, and the grantee of the former conveyance left to the action on his covenants.¹¹

¹ Co. Lit. 265 a. The feudal warranty bound the lord and his heirs to restore lands of equal value to their vassal if he was evicted. In cases where an heir released his future right with this warranty, his later entry was barred by the rebutter introduced by Coke.

² See Rawle, Covenants, 5 ed., § 262; *Right v. Bucknell*, 2 B. & Ad. 278; *Finance Co. v. Liberator Society*, 10 Ch. D. 15. But see *Bensley v. Burdon*, 2 Sim. & St. 519.

³ *Dye v. Thompson*, 126 Mich. 597.

⁴ *Gregory v. Peoples*, 80 Va. 355.

⁵ *Ayer v. Philadelphia, etc., Brick Co.*, 159 Mass. 84.

⁶ *Burton v. Reeds*, 20 Ind. 87.

⁷ *Baxter v. Bradbury*, 20 Me. 260.

⁸ *Reese v. Smith*, 12 Mo. 344.

⁹ *Hoyt v. Dimon*, 5 Day (Conn.) 479.

¹⁰ *White v. Patten*, 41 Mass. 324.

¹¹ *Wheeler v. Young*, 76 Conn. 44.

In a recent case the equitable nature of the doctrine was recognized. A debtor against whom there existed a judgment lien gave a warranty deed of land which he expected to inherit. The land subsequently descended, and the court held that the grantee took the land subject to the judgment lien. *Bliss v. Brown*, 96 Pac. 945 (Kan.). If the legal operation of the doctrine had been rigidly followed, the creditors' rights would have been defeated. The unfortunate results of some of these American cases emphasize the dangers which arise when courts of law, in passing on cases which in reality demand the application of equitable principles, fail to appreciate that intrinsic element.

THE RIGHT OF AN INDIVIDUAL TO PROSECUTE A PUBLIC WRONG. — In a recent case where the plaintiff, a private citizen, although he alleged no special damage, sought to enjoin the defendant from obstructing the land between high and low water mark, the court held that no right to a highway on the strip of land existed, but that even assuming there was such a right the plaintiff was not the proper party to protect it. *Barnes v. Midland Railroad Terminal Co.*, 126 N. Y. App. Div. 435. The *prima facie* right of the state to all seaports and arms of the sea is well established and is in its nature twofold.¹ The profits of the sea coast and havens belong to the sovereign; any invasion of this *jus privatum* is a purpresture.² On the other hand the sovereign holds for the benefit of all its subjects the right that they may at all times have free and unobstructed passage, and any obstruction of this *jus publicum* is a public nuisance, similar to the blocking of highways and bridges.³ At the suit of the state a court of equity will, of course, enjoin a violation of these rights⁴ since the legal remedy is inadequate.⁵ But an individual has no ground for complaint when a purely private right of the state is violated,⁶ nor would there seem to be any doubt that he cannot bring suit even when a public right is invaded.⁷ The state is the proper plaintiff in such a case, as is the trustee and not the *cestui* in actions to protect the trust property.⁸

An individual, however, may file a bill to enjoin a public nuisance if he shows special damage,⁹ that is, if there is an injury peculiar to himself and independent of the annoyance suffered by the public at large.¹⁰ Indeed a bill will be denied if the damage shown by the complainant, while differing in degree from the inconvenience to the public, is of the same kind.¹¹ This indicates that those cases in which the individual may have relief are not in essence exceptions to the general rule that only the state may sue, but are, rather, a necessary result of the fact that the defendant's act may embody two distinct wrongs: one against the public; the other against the indi-

¹ Hale, *De Jure Maris*, 12; *De Jure Portibus*, 85.

² *People ex rel. v. Jessup*, 160 N. Y. 249; see also *Attorney-General v. Chamberlaine*, 4 Kay & J. 292.

³ *King v. The Morris & Essex R. R. Co.*, 18 N. J. Eq. 397, 399.

⁴ *People v. Sturtevant*, 9 N. Y. 263.

⁵ *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 395.

⁶ See *Engs v. Peckham*, 11 R. I. 210.

⁷ *Jacksonville Ry. Co. v. Thompson*, 34 Fla. 346.

⁸ *Carey v. Brown*, 92 U. S. 171.

⁹ *Buskirk v. U. J. Jude Co.*, 115 N. Y. App. Div. 330.

¹⁰ *Nottingham v. B. & P. R. R. Co.*, 3 McArthur (D. C.) 517; 19 HARV. L. REV.

541.

¹¹ *Pittsburg, Ft. W. & C. Ry. Co. v. Cheevers*, 149 Ill. 430.

vidual. So, although proceedings have been or may be begun by the attorney-general on behalf of the state to restrain a public nuisance, an individual who has sustained special damage may also obtain relief.¹²

Another phase of this subject has been before the courts in the so-called "liquor cases."¹³ It was contended that statutes which made the selling of spirituous liquor indictable as a public nuisance and gave to every citizen, irrespective of special damage, the right to have such nuisance enjoined, were unconstitutional. As a general rule, it is true, equity will not intervene to prevent the commission of a crime as such,¹⁴ but it will not refuse to protect public or property rights merely because the acts complained of happen to be criminal.¹⁵ Nor can it be urged that these statutes deprive the defendant of the right to trial by jury, for the Constitution does not confer the right in cases where it did not exist previous to the adoption of the Constitution.¹⁶ Moreover, since the granting of an injunction is not punishment within the meaning of the Constitution,¹⁷ there is no question of double jeopardy involved.¹⁸ A private citizen cannot abate a public nuisance, for the destruction of property is a trespass even though it is being used for an illegal purpose,¹⁹ but the "liquor cases" are sound in holding that the state may empower individuals to enjoin a public nuisance, as this in fact merely involves a matter of procedure.²⁰

THE EXTENT OF THE CLAIM NECESSARY FOR ADVERSE POSSESSION. — At common law a disseisee, in addition to his right of entry which might be tolled by descent cast, discontinuance, or other cause, could regain his land by a writ of entry or other form of real action.¹ It was against these forms of action that the first statutes of limitation were directed.² Since mere possession without actual disseisin would never toll the entry³ and force the true owner to resort to an action, these old statutes could put title only in disseisors. The statute of James,⁴ on which the later statutes are based, merely barred the right of entry after twenty years. On its face, therefore, this statute would put title in any one against whom entry could have been made. But the judges for many years required a disseisin to set this statute running,⁵ probably because only disseisors had acquired rights by the former statutes. This was nothing less than judicial legislation and was

¹² *Cook v. Mayor, etc., of Bath*, L. R. 6 Eq. 177.

¹³ *Littleton v. Fritz*, 65 Ia. 488.

¹⁴ *Cope v. District Fair Ass.*, 99 Ill. 489.

¹⁵ *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. 264, where strikers were enjoined, although their acts constituted a statutory crime. But see 9 HARV. L. REV. 521.

¹⁶ *People ex rel. v. Mayor of Alton*, 233 Ill. 542; *People ex rel. v. Flaherty*, 119 N. Y. App. Div. 462.

¹⁷ *State ex rel. v. Roby*, 142 Ind. 169, 189.

¹⁸ *Ex parte Allison*, 99 Tex. 455. Cf. *State ex rel. v. Vankirk*, 27 Ind. 121 (proceeding for surety of the peace), and *Gardner v. The People*, 20 Ill. 430 (sustaining ordinances making punishable an act which is also punishable under state laws).

¹⁹ *State v. Stark*, 63 Kan. 529; 15 HARV. L. REV. 415.

²⁰ *Littleton v. Fritz*, *supra*.

¹ Co. Lit. 239 a.

² St. 32 Hen. VIII, c. 2. See Co. Lit. 115 a.

³ *Doe d. Souter v. Hull*, 2 D. & R. 38.

⁴ St. 21 Jac. I., c. 4.

⁵ *Reading v. Rawsterne*, 2 Ld. Ray. 829.

severely criticised as such.⁶ And while later courts have not adhered strictly to that requirement, yet they have felt its influence, and a study of the modern law of adverse possession needs reference to the old law of disseisin.

To a disseisin only a claim of freehold was necessary.⁷ As to the claim now necessary under the statute and the rights resulting from the adverse possession of one claiming less than a fee, there is no satisfactory authority. In a recent case where the defendant claimed under a void lease, it was held that by virtue of his possession for the statutory period he could not be ousted until the end of the term which the lease had attempted to give. *Warren Co. v. Lamkin*, 46 So. 497 (Miss.). The court did not consider the extent of the claim, but followed a former *sub silentio* decision,⁸ and overlooked an earlier opposing dictum.⁹ The defendant could not have been a disseisor, for a termor is possessed, not of the land, but of his term;¹⁰ and a disseisin involves an ouster from the freehold.¹¹ And it has been held in the only other American cases on the point to be found, that possession with a claim under a void lease, as in the principal case, will not satisfy the statute.¹² Again, although where a life estate is claimed there may be a disseisin,¹³ possession under such a claim is not adverse.¹⁴ But a claim of a life interest with a belief that the remainder is in another who is not the true owner is sufficient.¹⁵ Such a claim does dispute the fee of the owner, and those decisions can be reconciled with Justice Story's often cited dictum that the claim of a fee is necessary for adverse possession.¹⁶

This technical rule seems to be generally accepted, and, indeed, it has much in policy to commend it. But the purpose of the statute, to bar stale claims and so quiet title, might be better satisfied if the claim of the termor or life tenant were held to be sufficiently adverse. If it were so decided, the question would arise as to the extent of the estate thereby acquired. Estates of less duration than a fee may be gained under the statute when an adverse possessor claims against the tenant of a life estate, since the remainderman has no right of entry until the termination of the particular estate.¹⁷ Now a disseisor always acquired a fee regardless of the extent of his claim;¹⁸ but such a rule gives a wrongdoer more than he claimed, and operates harshly against a purchaser of the reversion. It would be sounder and more equitable to give the possessor an estate commensurate with his claim, with the remainder over to the true owner. Despite the authority, most of which is dicta, much can be said therefore in support of the principal decision as more closely adhering to the spirit of the statute of limitations.

⁶ See Ballantine, *Statute of Limitations*, 19, 21.

⁷ Co. Lit. 153 b, 181 a.

⁸ *Brown v. Supervisors*, 54 Miss. 230.

⁹ See *Magee v. Magee*, 37 Miss. 138, 152.

¹⁰ Co. Lit. 330 b.

¹¹ Co. Lit. 153 b, 181 a.

¹² *Sanders v. Riedinger*, 19 N. Y. Misc. 289. This follows an earlier decision based on absence of a disseisin. *Bedell v. Shaw*, 59 N. Y. 46.

¹³ It was said that entry under a mistaken belief of title in a life estate is not disseisin. See Com. Dig., *Seisin*, f. 3.

¹⁴ *Dewey v. McLain*, 7 Kan. 126.

¹⁵ *Board v. Board*, L. R. 9 Q. B. 48. See 18 HARV. L. REV. 381; 19 *ibid.* 59.

¹⁶ See *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 107.

¹⁷ *Orthwein v. Thomas*, 13 N. E. 564.

¹⁸ Co. Lit. 296; 180 b.

RECENT CASES.

ADVERSE POSSESSION — WHAT CONSTITUTES — CLAIM OF LEASEHOLD. —

Under a void lease for a term of 99 years from the plaintiffs, the defendant was in possession during the period of the Statute of Limitations. *Held*, that he cannot be ousted until the end of the 99 years. *Warren Co. v. Lamkin*, 46 So. 497 (Miss.). See NOTES, p. 138.

BANKRUPTCY — PREFERENCES — EFFECT OF CLEARING HOUSE RULES. —

The A bank, of the New York Clearing House, made clearances for the B bank, a non-member, under a contract in which the clearing house rules were incorporated. Those rules provided that such an agreement between a member and a non-member should not be terminated without one day's notice. The B bank became bankrupt, but checks on it presented through the clearing house the next day were paid by the A bank according to the agreement. Both the A bank and the drawers of these checks had notice of the bankruptcy. The A bank reimbursed itself from the funds of the B bank deposited as security at the time of the agreement. The receiver of the B bank brought suit to recover this amount from the A bank. *Held*, that he cannot recover. *Davenport v. National Bank of Commerce*, 112 N. Y. Supp. 291.

In general a payment from the assets of an insolvent to particular creditors after or within four months before bankruptcy is improper, and may be set aside by the trustee. *Chism v. Bank of Friars Point*, 5 Am. B. R. 56. But this rule does not apply where the payment is made for value. *Cook v. Tullis*, 18 Wall. (U. S.) 332. And a creditor who has previously obtained security may realize on it within the four months period. *In re Little*, 110 Fed. 621. Likewise it seems that a person who, previously to the insolvency, has obtained security for payments which he then contracted to make for the bankrupt should be protected, even if, by the previous contract, he is obliged to make such payments immediately before or after the bankruptcy. *Ryttenberg v. Schefer*, 131 Fed. 313. It has been held, moreover, on facts substantially the same as those in the principal case, that the tripartite agreement between the two banks and the clearing house was valid so that the member bank was bound to pay checks on the non-member presented through the clearing house the day after the non-member's bankruptcy, and was therefore entitled to reimburse itself from the securities it held. *O'Brien v. Grant*, 146 N. Y. 163.

BANKRUPTCY — PRIORITY OF CLAIMS — WATER RENTS ENTITLED TO PRIORITY AS TAXES. — The trustees of a bankrupt mortgagor of realty took possession of the premises and collected rents for about a year. While they were in possession the city levied water rents, and by statute such rents were made a lien on the property. The mortgagee bought the property at foreclosure and sought a decree directing the trustees to apply the rents first to payment of the water rents, then to payment of interest on the mortgage. *Held*, that he is entitled to the decree. *In re Industrial Cold Storage and Ice Co.*, 163 Fed. 390 (Dist. Ct., E. D. Pa.).

Under the National Bankruptcy Act a trustee must pay all taxes owing by the bankrupt, including those which have accrued since the filing of the petition. *In re Sims*, 118 Fed. 356. There is a conflict of authority, however, as to whether rents charged by a city for the use of water are taxes within the meaning of the act. *Springfield, etc., Ins. Co. v. Keeseville*, 148 N. Y. 46; *Fones v. Water Com'rs*, 34 Mich. 273. They are not subject to the constitutional requirement as to uniformity. *Wagner v. Rock Island*, 146 Ill. 139. And when charged for water actually used they are valid, although established without notice to the person paying them. *Silkman v. Water Com'rs*, 152 N. Y. 327. But taxes are invalid unless there is a provision for a hearing. *Re Trustees Union College*, 129 N. Y. 308. Water rents are not a lien on the property. *Chicago v. Northwestern, etc., Ins. Co.*, 218 Ill. 40. And when made so by statute are really liens for an indebtedness. See *Fones v. Water Com'rs*, *supra*.

They are in fact a price paid for a commodity, the obligation to pay resting on the promise of the owner implied in the taking of the water. *Vreeland v. O'Neil*, 36 N. J. Eq. 399. The better view, therefore, seems to be that water rents are not taxes, and should not constitute a prior lien on a bankrupt's estate.

BANKS AND BANKING — DEPOSITS — RIGHTS OF DEPOSITOR WITHDRAWING DEPOSIT DURING "RUN." — The petitioner, hearing rumors of its insolvency, withdrew his deposit from the X bank. But on the assurance of the X bank's officers that the bank was solvent he immediately returned the money and took drafts for the amount on the Y bank. In fact the X bank was insolvent, though its officers did not know the fact. The drafts were not paid, the Y bank applying the fund on which they were drawn to the payment of notes of the X bank held by it and secured by collateral. *Held*, that the petitioner is entitled to be subrogated to the rights of the Y bank in the collateral which it held. *Livingstain v. Columbia Banking and Trust Co.*, 62 S. E. 249 (S. C.).

The prevailing doctrine is that a payment to a depositor during a "run" on a bank is not a preference, provided the bank is continuing in business and the payment is made in the regular course thereof, even though the bank is insolvent to the knowledge of its officers. *Stone v. Jenison*, 111 Mich. 592. Hence the money withdrawn by the petitioner in the present case was not impressed with a trust in favor of the bank's general creditors. The drafts must therefore be regarded as issued for cash paid into the bank. But this does not warrant the relief given. For by the weight of authority the purchaser of a draft drawn by an insolvent bank has no priority over the general creditors against the funds on which the draft was drawn. *Clark v. Toronto Bank*, 72 Kan. 1. *Contra, Roberts v. Corbin*, 26 Ia. 315. It is therefore submitted that the case falls within the rule that subrogation, being founded on equitable principles, should not be applied against the interests of persons having equities equal to that of the claimant. *Cf. Ex parte Reynolds*, 68 S. C. 436. But see *Livingstain v. Columbia Bank*, 77 S. C. 305.

BILLS AND NOTES — DOCTRINE OF PRICE v. NEAL — WHERE DEFENDANT IS NOT AN INNOCENT HOLDER FOR VALUE. — A person not disclosed forged a check payable to a city and without the defendant's knowledge or request delivered it to the city in payment of improvement assessments on the defendant's land. The drawee bank paid the check to an innocent holder for value and after discovery of the forgery sought to recover from the defendant. *Held*, that the plaintiff may not recover. *Title Guarantee and Trust Co. v. Haven*, 126 N. Y. App. Div. 802.

It has long been law that the drawee of a forged check who has paid the same to an innocent holder for value cannot recover from the latter. *Price v. Neal*, 3 Burr. 1354. Not only has this much criticised rule been adopted as common law in this country, but it has also been made a part of the Negotiable Instruments Law. See N. Y. Laws of 1897, c. 612, § 112. Though the principal case is professedly decided on the doctrine of *Price v. Neal*, it is difficult to see the application. This is not a case wherein "one of two innocent parties must suffer a loss in any event," nor does it come within the reason of the rule that as between parties having equal equities the loss must rest where it falls." See 4 HARV. L. REV. 297. Whether an action for money paid to the defendant's use would lie, the authorities seem doubtful. *Mattlage v. Lewi*, 6 N. Y. Misc. 150. However, it is submitted that a quasi-contractual remedy exists; for the defendant, if allowed to retain the fruits of the fraud without liability, is clearly unjustly enriched.

BILLS AND NOTES — FICTITIOUS PAYEE — THE NEGOTIABLE INSTRUMENTS LAW. — A drew a check on the plaintiff payable to B, a real person, and forged C's signature thereto. The plaintiff accepted the check. A then forged B's signature as indorser after which the check passed in due course of business to the defendant who paid it. The plaintiff paid the defendant, but on discovering the forgery sought to recover the amount paid. *Held*, that the plaintiff may

not recover. *The Trust Co. of America v. Hamilton Bank*, 127 N. Y. App. Div. 515.

The Negotiable Instruments Law provides that "the instrument is payable to bearer . . . when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable." See N. Y. Gen. Laws, c. 50, § 28. In the principal case the instrument was made payable in name to a real person. But in this country the intention of the drawer determines the fictitiousness of the payee. *Shipman v. Bank*, 126 N. Y. 318; *Armstrong v. Nat'l Bank*, 46 Oh. St. 512. If the drawer intends that the name inserted as payee shall not represent any person who shall receive an interest in the check, the payee is fictitious. See *Shipman v. Bank*, *supra*. And the possibility of identifying such name with some existing person is of no consequence. *Phillips v. Mercantile Nat'l Bank*, 140 N. Y. 556. The main case therefore seems correct. The same result has been reached in England under the Bills of Exchange Act in a case involving exactly similar facts. *Bank of England v. Vagliano Bros.*, [1891] A. C. 107. The New York statute to have avoided litigation on this point might have added the further clause: "or to a living person not intended to have any interest in it."

BROKERS—CUSTOMERS' RIGHTS IN PROCEEDS OF STOCK WRONGFULLY REPLEGDED.—A delivered shares of stock to a broker for safe keeping; B pledged shares with him as collateral for advances; the broker held shares purchased for C on margin. The broker pledged all the shares to D and then became insolvent. D, to satisfy his claim, sold all of A's and some of B's shares. *Held*, that A is entitled to have the stock of B and C sold and the proceeds applied in satisfaction of his claims against the broker. *Matter of Mills*, 39 N. Y. L. J. 761 (N. Y., App. Div., May, 1908). See NOTES, p. 133.

CONSTITUTIONAL LAW—CLASS LEGISLATION—DENIAL OF RIGHT TO CHALLENGE GRAND JURORS.—A New Jersey statute provided that any grand jurymen over 65 years old might be challenged, but that such challenge must be taken before the impaneling of the grand jury. The defendant was convicted of a murder committed after the grand jury was impaneled. Two of its members were over 65 years old. *Held*, that although the defendant was unable to challenge, his conviction is not a denial of equal protection of the laws. *Lang v. New Jersey*, 209 U. S. 467.

Equal protection of the laws requires that all persons shall be treated alike in like circumstances. But classification based upon some real difference is not thereby prohibited. Accordingly, statutes allowing more challenges in large cities than elsewhere, or fewer challenges in the event of a struck jury, do not deny the equal protection of the laws. *Hayes v. Missouri*, 120 U. S. 68; *Brown v. New Jersey*, 175 U. S. 172. In the principal case, if offenders are divided into two classes—those committing crime before and after the impaneling of the grand jury—there is certainly no discrimination within the classes. And a difference in time is one upon which classification for the more efficient administration of justice may reasonably be based. See *State v. Jackson*, 105 Mo. 196. But according to the interpretation of the statute by the New Jersey court, there is no real classification; for the defendant had the same right, though not the same motive, as those who had committed offenses before the impaneling of the grand jury, to challenge before that time. *State v. Lang*, 68 Atl. 210 (N. J.). Hence he has not been subjected to unfavorable discrimination. It is upon this theory that the case may be most satisfactorily supported.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—JURISDICTION OF THE COURTS OVER CONTROVERSIES INVOLVING POLITICAL QUESTIONS.—The plaintiff brought an action in the courts of British India to establish his right to succeed to lands there situated as the rightful successor to the existing Rajah of an independent native state. *Held*, that the court has no jurisdiction, since, the plaintiff's property right being merely contingent, the court is really asked to determine the succession to the throne of a sovereign. *Shamarendra Chandra Deb Barman v. Birenda Kishore Deb Barman*, 12 Calcutta W. N. 777 (Calcutta High Ct., May 21, 1908). See NOTES, p. 132.

DAMAGES — MITIGATION OF DAMAGES — BENEFITS RECEIVED FROM THIRD PERSON. — A landlord broke his covenant to renew a lease on a certain date. The land was taken by eminent domain, but the tenant was allowed by the city which took it to remain for some time thereafter. He was finally evicted and sued for the breach of covenant. *Held*, that in computing the damages the period during which the plaintiff had occupied as tenant of the city should not be excluded. *Neiderstein v. Cusick*, 126 N. Y. App. Div. 409.

It is a general rule that the fact that the plaintiff has been compensated by a third person, wholly independently of the defendant, is not admissible in mitigation of damages. It has been held, however, in actions to recover for loss of time and medical expenses, that if the plaintiff's wages were not stopped and he was cared for in a free hospital, the damages should be proportionately reduced. *Drinkwater v. Dinsmore*, 80 N. Y. 390; *Duke v. Mo. Pac. Ry.*, 99 Mo. 347. But the weight of authority is against these decisions. *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Nashville, etc., Ry. v. Miller*, 120 Ga. 453. And in an action by a lessor for the lessee's breach of a covenant to repair, evidence that the next tenant put the premises in good condition is not admissible in mitigation of damages. *Appleton v. Marx*, 191 N. Y. 81. The rule seems to be opposed to the principle that damages are imposed only to indemnify the plaintiff for the actual loss he has suffered, not to punish the defendant for the wrong he has done. It can be justified only on grounds of expediency.

EASEMENTS — IMPLIED GRANT AND RESERVATION — LIGHT AND AIR. — A owned two adjacent lots, one vacant, the other occupied by a building. He conveyed the latter to B, and later conveyed the former to C. *Held*, that on the conveyance to B there arose by implied grant an easement of light and air over the vacant lot. *Fowler v. Wick*, 70 Atl. 682 (N. J., Ct. Ch.).

Whether a grant of an easement of light and air will be implied is a controverted question in this country. The principal case follows the well-settled English rule that such implication will be made from the grant of a house having windows overlooking land retained by the grantor. *Palmer v. Fletcher*, 1 Lev. 122. See *Allen v. Taylor*, 16 Ch. D. 355. In some states in this country the doctrine has been entirely repudiated, no such easement being allowed unless by express grant. *Keats v. Hugo*, 115 Mass. 204. Other states make the implication only on the strictest necessity. *Robinson v. Clapp*, 65 Conn. 365. Still others apply a less rigorous rule of necessity. See *Turner v. Thompson*, 58 Ga. 268. With the exception of Maryland, New Jersey seems to be the only jurisdiction where the English rule is fully recognized. *Janes v. Jenkins*, 34 Md. 1.

ESTOPPEL — ESTOPPEL BY DEED — EFFECT OF JUDGMENT LIEN. — A debtor against whom there existed a valid judgment lien gave a warranty deed of land which he expected to inherit. The land subsequently descended to him. *Held*, that the grantee in the conveyance takes the property subject to the judgment lien. *Bliss v. Brown*, 96 Pac. 945 (Kan.). See NOTES, p. 136.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — RIGHT OF SET-OFF AGAINST LEGATEES OR HEIRS. — The defendant was a beneficiary under the will of A and the residuary legatee under that of B. A debt due from B to A was barred by the Statute of Limitations. The trustees of A's estate took out a summons to determine the question of the defendant's liability to the estate. *Held*, that the defendant must bring into account the amount of the debt, as against his share of the testator's estate. *In re Bruce*, 98 L. T. R. 834 (Eng., Ch. D., April 2, 1908).

It is settled in England that if a beneficiary is indebted to the estate, but the debt is barred by the Statute, the executor can retain the amount of the debt, on the theory that the beneficiary already holds part of the assets to which he is entitled. *In re Akerman*, [1891] 3 Ch. 212. This doctrine is questionable, but the principal case goes much further; for here the beneficiary owed nothing to the estate. He had never received any of the assets to which he was entitled, and therefore the application of the rule breaks down. A prior English case expressly recognizes this necessity for a debt; for it was held that a loan from the

testator to a legatee, a married woman, which she was morally though not legally bound to repay, could not be set off against her legacy. *In re Wheeler*, [1904] 2 Ch. 66. The present decision can be supported, if at all, only on the ground that it would be unconscionable for the beneficiary to take his share of the estate without accounting for the debt.

EXTRADITION — INTERNATIONAL EXTRADITION — RETROACTIVE TREATY. The defendant, having committed bribery in Ohio in 1906, fled to Ontario. The Ohio authorities demanded his return under the treaty between Great Britain and the United States. This treaty was not ratified until 1907, but it provided that there might be extradition for bribery committed since 1889. *Held*, that the defendant may be extradited. *Re Cannon*, 12 Ont. W. Rep. 171.

A fugitive from the justice of one country is not guaranteed an asylum in any other country. *Ker v. Illinois*, 119 U. S. 436. Extradition, therefore, is a mere form of procedure which deprives him of no substantial right. Accordingly it is not a form of punishment within the meaning of the United States constitutional provision against *ex post facto* laws. *Duncan v. Missouri*, 152 U. S. 377. And in the United States it seems settled that an extradition treaty operates retroactively unless it contains a provision expressly declaring that it shall not apply to crimes committed prior to its conclusion. *In re De Giacomo*, 12 Blatchf. (U. S.) 391. *A fortiori* the defendant is liable to be extradited where the parties to the treaty, as in the one under consideration, clearly intended it to have a retroactive effect.

GOOD WILL — BASIS OF VALUATION ON DISSOLUTION OF PARTNERSHIP. — A retiring partner demanded an accounting for his share in the firm assets, including the good will, from the surviving partner who had taken over the entire assets of the firm and continued the business under the old name. *Held*, that the defendant must account for salable value of the good will at the time of dissolution on the basis that either partner has a right to carry on a new business of the same kind and to solicit trade from customers of the old firm. *Moore v. Rawson*, 85 N. E. 586 (Mass.).

When a partnership business has been sold under bankruptcy proceedings, the law of both England and this country allows either partner to set up a new business of the same kind and to solicit trade from the customers of the old firm, and the value of the good will is estimated accordingly. *Walker v. Mottram*, 19 Ch. D. 355; *Hutchinson v. Nay*, 187 Mass. 262. When, however, there is a voluntary sale by one partner of his interest in the business, the English law, though it allows the seller to set up a new business of the same kind, prohibits him from soliciting the patronage of the customers of the old firm and the courts assess the good will on this basis. *Trego v. Hunt*, [1896] A. C. 7. In the case of a sale of the good will on dissolution of a partnership the English courts apply the rule in voluntary sales. *In re David and Matthews*, [1897] 1 Ch. 378. But in the principal case the rule in sales under bankruptcy proceedings was applied. It is submitted that the sale was essentially voluntary, and that therefore the English view should have been followed.

HABEAS CORPUS — PARENT'S RIGHT TO WRIT DISCHARGING INFANT SON FROM ARMY. — A parent sued out a writ of *habeas corpus* to secure the discharge of his infant son from the army under R. S. U. S. § 1117, which provided that "no person under the age of twenty-one years shall be enlisted or mustered into the service of the United States without the written consent of his parents or guardian." After the writ had issued the infant was arrested and charges were instituted against him for fraudulent enlistment. *Held*, that the writ should be dismissed. *Ex parte Lewkowitz*, 163 Fed. 646 (Circ. Ct., S. D. N. Y.).

The enlistment of an infant over sixteen years of age is binding upon the infant himself, but voidable at the option of the parent or guardian. *In re Morrissey*, 137 U. S. 157. If the infant has been sentenced by court martial, he will not be released on the petition of his parent or guardian. *In re Dowd*, 90 Fed. 718. Nor will he be released if a court martial has obtained jurisdiction

of the cause before such petition. *In re Miller*, 114 Fed. 838; *In re Scott*, 144 Fed. 79. But it has been held that where the arrest is made and charges are preferred after the petition, a writ of *habeas corpus* should issue. *Ex parte Houghton*, 129 Fed. 239. See *In re Carver*, 103 Fed. 624. A number of cases, however, hold that, when an arrest has been made and a writ has issued, if charges are later preferred against the infant before the final hearing, the writ should be discharged. *United States v. Reaves*, 126 Fed. 127; *In re Carver*, 142 Fed. 623. On principle these cases seem indistinguishable. In both cases proceedings were pending, but in neither had the court martial obtained jurisdiction when the petition was filed. The principal case seems right, therefore, in holding that the latter cases practically overrule the former; and the practical result reached seems desirable.

INDEMNITY — TORT COMMITTED AT ANOTHER'S REQUEST. — The defendant, a stockbroker, identified a woman at the plaintiff bank as the owner of certain stock, receiving only a nominal fee for his trouble. He had good reason for thinking her to be the owner, but she was in fact a fraudulent impersonator. At her order the bank registered a transfer of the stock, which it was later compelled to make good to the true owner. *Held*, that the defendant is bound to indemnify the plaintiff as having impliedly requested the transfer. *Bank of England v. Cutler*, [1908] 2 K. B. 208. See NOTES, p. 131.

INJUNCTIONS — ACTS RESTRAINED — CONTRACT IN RESTRAINT OF TRADE. The plaintiff and the defendant, practicing dentists, entered into a contract whereby the defendant agreed not to practice a certain method of extracting teeth in Philadelphia for ten years. The plaintiff filed a bill to enjoin the defendant from so practicing. *Held*, that although the contract is good at law, the plaintiff is not entitled to an injunction. *Thomas v. Borden*, 65 Leg. Int. 404 (Pa., Dist. Ct., July 31, 1908).

Equity frequently refuses an injunction on the ground that it would work an injury to the public. *Valparaiso v. Hagen*, 153 Ind. 337. See 22 HARV. L. REV. 61. But this doctrine seems never to have been applied to the case of a contract in restraint of trade admittedly good at law. The logical reason for this is that any unreasonable restraint of trade renders a contract invalid. *Nordenfelt v. Maxim, etc., Co.*, [1894] A. C. 535. If the contract is valid, it follows that it does not unreasonably restrain, and therefore equity should not on this ground refuse to enjoin a breach. It is clear that physicians may be enjoined from breaking agreements not to practice in a certain vicinity. *Wilkinson v. Colley*, 164 Pa. St. 35; *Beatty v. Coble*, 142 Ind. 329. But here it was contended that the agreement tended to give the plaintiff a quasi-monopoly on this particular method of extracting teeth. The court ruled that there can be no equitable right to a monopoly in the means of relieving human suffering. This doctrine, if followed to its logical conclusion, would preclude equity from protecting patents on surgical instruments and medicines. Clearly that is not law. *Farbenfabriken of Elberfeld Co. v. Harriman*, 133 Fed. 313; *Rowley v. Koeber*, 135 Fed. 363.

INSURANCE — RESCISSION OF CONTRACT FOR FRAUD. — The plaintiff was induced to continue a policy of life insurance by the fraudulent representations of the insurer's agent. *Held*, that on discovering the fraud the plaintiff can rescind, and recover the full amount of the premiums paid. *Kettlewell v. Refuge Assurance Co.*, 24 T. L. R. 216 (Eng., Ct. App., June 10, 1908). See NOTES, p. 134.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — EFFECT ON JURISDICTION OF TERRITORY'S BECOMING STATE. — A complaint was filed before the Interstate Commerce Commission stating that the defendant maintained an unreasonable rate on shipments between two towns and asking that the rate be made reasonable for the future and that the complainant be awarded damages on past shipments. Thereafter the territory within which both towns lie was admitted into the Union as a state. *Held*, that the Commission has no jurisdiction, not only as to regulating the rate for the future, but also

as to awarding damages for past shipments. *Hussey v. Chicago, Rock Island, & Pacific R. R.*, 13 Interst. C. Rep. 366.

In general, a court which has once obtained jurisdiction over a case cannot be deprived of it by a subsequent change of circumstances. *Culver v. Woodruff County*, 5 Dill. (U. S.) 392. But, if the legislative act under which the court has jurisdiction is repealed during the action, the court loses power to pronounce judgment. *Railroad Co. v. Grant*, 98 U. S. 398. The organization of a territory into a state ordinarily repeals federal laws existing as to that territory. *Ames and Duff v. Colorado Central R. R.*, 4 Dill. (U. S.) 251. In the principal case it is clear that the Commission lost jurisdiction to regulate the rate in question for the future. But the repeal of the jurisdiction of a court must be express or necessarily implied. See *Pratt v. Atlantic & St. Lawrence R. R.*, 42 Me. 579. And it is not entirely clear that the organization of the territory into a state necessarily implied the loss of the commission's jurisdiction to award damages for shipments already made. The case goes on the ground that the Commission was not authorized to interfere with a rate unless such action would tend to establish the uniformity of the rate.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — ASSIGNMENT BY SALE UNDER LEGAL PROCESS. — The plaintiff gave a lease with a condition of re-entry if the lease should be assigned or the lessee's interest sold under execution or other legal process. At the lessor's request the court appointed a receiver for the lessee and ordered him to sell the leasehold. He sold without covenants to one who became bankrupt. The trustee in bankruptcy applied to the court for an order to sell the leasehold. *Held*, that the trustee may sell without forfeiting the term. *Gazlay v. Williams*, 210 U. S. 41.

In order to prevent a forfeiture courts of law will construe strictly a condition provided to work one. *Riggs v. Pursell*, 66 N. Y. 193. Accordingly in the absence of collusion amounting to fraud a transfer by operation of law is not regarded as violating a condition against assignment. *Doe v. Carter*, 8 T. R. 300; *In re Bush*, 126 Fed. 878. Furthermore the court seems justified in holding that the involuntary transfer to the trustee was not a sale under legal process. And the trustee in bankruptcy should not be bound by a covenant or condition against assigning; for the property came to him for that purpose. See *Doe v. Bevan*, 3 M. & S. 353. It is not clear whether the court considers applicable to this case the rule that a condition not to alien without license is terminated by the first license. *Dumpor's Case*, 4 Co. 119b. See 12 HARV. L. REV. 272. It seems very doubtful whether the rule applies; for the lessor expressly stipulated that the land be sold with the old covenants. If, however, there was a license sufficient to satisfy the rule, it was unnecessary for the court to construe the lease; for the condition would be terminated forthwith. See 20 HARV. L. REV. 420.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — SEVERANCE OF REVERSION. — The plaintiff leased to A with a condition providing for re-entry for failure to cultivate. The defendant through eminent domain proceedings received a conveyance of the reversion of part of the land and an assignment of the entire leasehold. The plaintiff claimed the right of re-entry for failure to cultivate. *Held*, that he is entitled to re-enter. *Piggott v. Middlesex County Council*, 125 L. T. 337 (Eng., Ch. D., July 24, 1908).

A grantee of part of a reversion is not allowed to enforce against the lessee a condition in the lease concerning the land. *Mitchell v. M'Cauley*, 20 Ont. App. 272. A severance of the reversion destroys the condition, and so even the grantor's right to sue. *Knight's Case*, 5 Co. 55 b. An early case established an exception in cases where the severance is "by descent, eviction or act of law," as opposed to an act of the parties. *Winter's Case*, Dyer 308 b. The main case in holding a severance by eminent domain an act of law within the exception reaches a just result. It was thought the reason for the general rule lay in the fact that otherwise two suits might be brought against the lessee. Accordingly, when this possibility was destroyed by a grant of part of the reversion to the lessee, a second exception was made. *Hyde v. Warden*, 3 Ex. D. 72.

This reasoning, however, is erroneous; for it would apply to covenants, and yet covenants pass with part of the reversion. *Twynnam v. Pickard*, 2 B. & Ald. 105. The true basis for the rule is the law's hostility to a forfeiture.

LEGACIES AND DEVISES — LAPSED BEQUESTS AND DEVISES — PROVISION TO CANCEL A BOND. — A husband and wife joined in a mortgage bond to X. X, for the purpose of benefiting the wife, made a provision in her will cancelling the mortgage. The wife predeceased X. *Held*, that the husband is bound on the mortgage. *Simmons' Estate*, 65 Leg. Int. 406 (Dist. Ct., Pa., July 7, 1908).

A provision in a will cancelling the legatee's obligation on a bond given to the testator lapses on the legatee's predecease of the testator. *Toplis v. Baker*, 2 Cox Ch. 118. Nor will the fact that there is a surviving co-obligor prevent a lapse, if that co-obligor is not an object of the testator's bounty. *Maitland v. Adair*, 3 Ves. Jr. 231; *Izon v. Butler*, 2 Price 34. These decisions are in direct support of the principal case, since the cancellation of the bond was construed as a legacy to the wife. One case has been found, however, which holds that a provision in a will to cancel a bond does not lapse on the legatee's predecease. *Sibthorp v. Moxton*, 1 Ves. 48. But that case proceeds on the ground that it was the testator's intent to benefit the legatee's family. The correctness of the decision is very doubtful, for the members of the family are practically made beneficiaries without being mentioned in the will. See *Toplis v. Baker*, *supra*. Whatever its merits, it does not affect the present case, for here the sole intent of the testatrix was to benefit the wife.

MORTGAGES — FORECLOSURE — PROVISION FOR ACCELERATION OF DEBT. A mortgage provided that upon a default of thirty days in the payment of interest the mortgagee might elect to treat the whole debt as due. The mortgagor was not actually insolvent, but his affairs were placed in the hands of temporary receivers. The interest became due and the receivers allowed it to remain unpaid thirty days. The mortgagee thereupon sued to foreclose, but the mortgagor, having resumed business on the discharge of the receivers, tendered the interest due. *Held*, that the mortgagee is not entitled to foreclose. *Smith v. Lamb*, 59 N. Y. Misc. 568.

A provision of this kind is generally held not to be in the nature of a penalty or forfeiture, but to be valid and enforceable in equity as at law. *Pizer v. Herzig*, 120 N. Y. App. Div. 102; *Mobray v. Leckie*, 42 Ind. 474. Nor will the tender of interest due bar the mortgagee's right to foreclose. *Swearingen v. Lahner*, 93 Ia. 147. Equity, however, will refuse its aid where the enforcement of such a clause would be unconscionable. Accordingly, when the mortgagee has contributed to the default he cannot enforce the stipulation. *De Groot v. McCotter*, 19 N. J. Eq. 531; and see *Pizer v. Herzig*, *supra*. And although the mere negligence of the mortgagor is no excuse, an honest mistake is ground for relief. *Lynch v. Cunningham*, 6 Abb. Pr. (N. Y.) 94; *Martin v. Melville*, 11 N. J. Eq. 222. The facts here present a much stronger case for equitable relief. The court in the exercise of the sovereign power of the state has, by disabling the mortgagor from performance, caused the default. Similar circumstances have been held to excuse the non-performance of contracts. *Malcomson v. Wappoo Mills*, 88 Fed. 680. *Contra*, *Bolles v. Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614. As it was not shown that the mortgagor would suffer by losing his right to foreclose, the decision accomplishes complete justice.

MUNICIPAL CORPORATIONS — ASSESSMENT FOR LOCAL IMPROVEMENTS — VARIANCE FROM CONTRACT AS DEFENSE. — A city council could provide for street improvements only through an ordinance. An ordinance was passed ordering the entire street on which the defendant's property abutted to be paved with brick except that a ten-foot strip was to be paved with crushed granite. A contract in conformity with this ordinance was made, but it was later altered to the extent that the whole street was paved with brick. A subsequent ordinance purported to ratify the improvement as so completed, and an assessment

ordinance was passed. The defendant refused to pay his assessment. *Held*, that he is not liable. *City of Lexington v. Walley*, 109 S. W. 299 (Ky.).

A substantial variance from a contract for city improvements will invalidate an assessment therefor. *Scranton Sewer*, 213 Pa. 4. The improvement is then regarded as if made without the authorizing ordinance required by statute as a public safeguard. *City of Excelsior Springs v. Ettenson*, 96 S. W. 701 (Mo.). It is usually no defense that the work was not done strictly according to specifications, where the proper authorities have accepted it, but this rule does not apply so as to permit a city to accept an improvement essentially different from the one contracted for. *Gage v. People*, 193 Ill. 316. Nor could a subsequent ordinance ratify the work so as to validate the assessment; otherwise that which had to be done by ordinance could in effect be accomplished without that formality. *Hubbell v. Bennett*, 130 Ia. 66. But to require literal compliance in every respect where there has been an honest endeavor to perform the contract would allow the assessment to be avoided on technical grounds. See *Lindsey v. Brawner*, 97 S. W. 1 (Ky.). Such a course is as open to objection as permitting the city to accept a totally different improvement. Whether in the case considered there was a substantial variance is doubtful. *Cf. City of Lowell v. Hadley*, 49 Mass. 180.

NUISANCE — EQUITABLE RELIEF — BILL AGAINST PUBLIC NUISANCE BY INDIVIDUAL. — The defendant, a riparian owner on New York Bay, erected a pier. The complainant, although he showed no special damage, prayed that the defendant be enjoined from obstructing the public right of way between high and low water mark. *Held*, that the complainant is not entitled to an injunction. *Barnes v. Midland Railroad Terminal Co.*, 126 N. Y. App. Div. 435. See **NOTES**, p. 137.

PRESCRIPTION — ACQUISITION OF RIGHTS — PRESCRIPTIVE DAMAGE. — The plaintiffs sought to enjoin the defendant from causing sewage to pass over their oyster beds, alleging as damage that the sale of their oysters had been recently prohibited. The defendant relied on a prescriptive right, proving that sewage had been so passed during the statutory period. *Held*, that the injunction should be granted. *Owen v. Faversham Corporation*, 72 J. P. 404 (Eng., Ch. D., June 23, 1908).

In general a natural right is not invaded unless some actual damage is suffered. *Sturges v. Bridgman*, 11 Ch. D. 852. An exception is made in the case of water rights, in which any sensible diminution gives a right of action. *Roberts v. Gwyrfa District Council*, [1899] 1 Ch. 583. A prescriptive right to commit a nuisance has been acquired when no actual damage was suffered during the statutory period. *Dana v. Valentine*, 5 Met. (Mass.) 8. The prerequisite right of action involved in this doctrine is based on either of the fallacious views, that an action must be given to prevent the acquisition of a prescriptive right, or that damage, though not yet actual, may be assumed to exist because of a possible prospective alteration in the use of the property. See *Farly v. Gate City Gaslight Co.*, 105 Ga. 323; *Ruckman v. Green*, 9 Hun (N. Y.) 225. The general adoption of this rule would entail a constant watchfulness by landowners for possible future damage and much accompanying litigation. And in the absence of such caution prescriptive rights would so multiply as to impair seriously the development of property. This rule, not at all established in this country, the English courts wisely refuse to follow.

PROPERTY — LANDLORD AND TENANT — SURRENDER BY DELIVERY OF KEYS. — A landlord accepted the keys from a tenant who left before the end of his term, but specified that it was only for the purpose of re-letting for the tenant's benefit. He advertised at an increased rental and contracted for extensive alterations to be made at once. He later sued for the rent due after the tenant had vacated. *Held*, that the tenant is not liable. *In re Schomacker Pianoforte Mfg. Co.*, 163 Fed. 413 (Dist. Ct., E. D. Pa.).

A mere delivery of the keys by the tenant to the landlord does not work a surrender of the term. *Newton v. Speare Co.*, 19 R. I. 546. But it is settled that

a delivery of the keys and an unqualified acceptance by the landlord do amount to a surrender. *Dodd v. Acklom*, 6 M. & G. 672. The general rule is that if the landlord's acts are inconsistent with the existence of the particular estate he is deemed to have accepted the tenant's offer to surrender. See 22 HARV. L. REV. 55. Thus where a landlord lets the vacated premises to a third person without the tenant's assent there is a surrender by operation of law. *Gray v. Kaufman Co.*, 162 N. Y. 388. And when he enters and makes alterations, the term is surrendered. *McKellar v. Sigler*, 47 How. Pr. (N. Y.) 20. In the principal case the landlord's intention in fact was not to rent the premises for the tenant's benefit, but, by making alterations during the continuance of the term, so to improve the house that it would command a higher rental in the future. Such a position is inconsistent with the relation of landlord and tenant and ends the tenant's liability for rent. *Duffy v. Day*, 42 Mo. App. 638.

WAGERING CONTRACTS — RENEWED PROMISE TO PAY FOR NEW CONSIDERATION. — The defendant gave the plaintiff a check on a gambling debt. After part payment, the defendant promised to pay the balance, if the plaintiff would hold over the check and not publish him as a defaulter. *Held*, that the plaintiff can recover on the new contract. *Hyams v. Stuart King*, [1908] 2 K. B. 696.

Not publishing the defendant as a defaulter is new and sufficient consideration. See 8 HARV. L. REV. 27; 12 *ibid.* 515. But an obligation arising out of an illegal transaction, even though for new consideration, will not be enforced between the same parties, if the plaintiff requires the aid of the original transaction to make out his case. See *Gray v. Hook*, 4 Comst. (N. Y.) 449. Accordingly, in America, where a wagering contract is regarded as both void and illegal, an agreement to settle it for new consideration on a new basis is invalid. *Everingham v. Meighan*, 55 Wis. 354. The principal case ought to be similarly decided, if the original transaction were clearly illegal. See *Simpson v. Bloss*, 7 Taunt. 246. But wagering contracts were valid at common law. The English statute makes them void, but not illegal. *Fitch v. Jones*, 5 E. & B. 238. Hence there is no taint of illegality to carry over to the new contract, even though it arises out of the original void transaction. Upon the assumption that the first transaction is merely void, the case is rightly decided, and follows previous English decisions. *Bubb v. Yelverton*, L. R. 9 Eq. 471; *In re Browne*, [1904] 2 K. B. 133.

WASTE — PERMISSIVE WASTE — WHETHER TENANT FOR YEARS LIABLE FOR TREBLE DAMAGES. — A tenant for years was guilty of permissive waste. *Held*, that he is not liable for treble damages. *Rimoldi v. Hudson Guild*, 59 N. Y. Misc. 480.

At common law an action of waste only lay against tenants in by act of law. 2 Co. Inst. 299. To protect the inheritance against the waste of tenants in by act of the parties, the Statute of Marlbridge was passed in 1267 providing that termors should not "do or make waste." 52 Hen. III, c. 23. That proving inadequate, the Statute of Gloucester in 1278 enacted that one guilty of waste should forfeit his term and pay treble damages. 6 Ed. I, c. 5. These ancient statutes are a part of the common law of this country. *Sackett v. Sackett*, 8 Pick. (Mass.) 309. In many states they have been re-enacted. See N. Y. Code Civ. Proc. § 1655. Prior to these statutes waste was recognized in the law as an injury to the inheritance resulting from acts of either commission or omission. See *Moore v. Townshend*, 33 N. J. L. 284. The statutes did not create new kinds of waste, but gave a new remedy for the old wastes. See 2 Co. Inst. 145. Consequently it has been held that to "do or make waste" includes permissive as well as voluntary waste. *Robinson v. Wheeler*, 25 N. Y. 252. And by the weight of authority a tenant for years is liable in full damages for permissive waste. *Newbold v. Brown*, 44 N. J. L. 266. It is, therefore, difficult to support the principal case. See *Coke v. The Champlain Transportation Co.*, 1 Den. (N. Y.) 91.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE NATURE OF A BANK'S INTEREST IN PAPER DEPOSITED FOR DISCOUNT OR COLLECTION. — There has been a growing tendency to hold that a bank is not a holder in due course of negotiable paper deposited for discount or collection. Some of the older cases held that the bank became a holder in due course, because the depositor had no right to recall a check so deposited. These are condemned in a recent article on the ground that there is lack of consideration, since the bank gives nothing but a mere crediting with the right to draw immediately, and that until the bank pays out something on the paper, or gives up securities for it, or in some other way furnishes substantial value, it cannot be considered the owner. *When Is a Bank the Bona Fide Owner of a Check Left for Deposit or Collection*, by Albert S. Bolles, 56 U. P. L. Rev. 375 (June, 1908). The more recent decisions *prima facie* support the author's contentions in the case of notes, but he finds a different rule prevailing as to checks. Mr. Bolles repudiates this distinction, and maintains that in either case if the depositor has a fund with the bank larger than the amount of the instrument no title should pass, but if less the bank should own, either absolutely or to the extent of its lien.

The test suggested seems unsatisfactory. The question can be better settled by an analysis of the true relationship which arises when indorsed negotiable paper is deposited for discount or collection. The cases hold that where such paper is deposited for collection the interest of the depositary bank is inferior to the depositor's, and that the bank to which the paper is sent for collection gets no better right than the depositary bank.¹ These principles are often expressed by saying that neither of the banks gets "title" to the paper. Yet the courts hold that a *bona fide* purchaser from either owns outright, and free from previous equities.² The cases can be reconciled on the theory either of agency and subagency, or of trusts. The latter seems preferable. On indorsement to the depositary bank for collection the legal title passes, since indorsement is the mode of transferring title to negotiable paper, whether to a bank or an individual.³ But the bank is to hold the legal title, not for its own benefit, but for the depositor's. When the depositary bank indorses to the collecting bank, the latter thereby gets the legal title, which it must hold in trust for the depositary bank, and the latter in turn holds the equitable claim so created in trust for the depositor.⁴ When the former collects the money it will, according to the recognized custom of bankers, simply owe the depositary the amount. The depositary then holds this legal claim in trust for the depositor. When the banks settle *inter se*, the trust disappears, and the depositary bank becomes a simple debtor of the depositor.⁵ The same principles apply to the case

¹ Meridian First Nat'l Bank v. Strauss, 66 Miss. 479; Commercial Bank v. Marine Bank, 1 Abb. App. Dec. (N. Y.) 405.

² See Cody v. City Nat'l Bank, 55 Mich. 379.

³ Giles v. Perkins, 9 East 12. See Ames, Cas. Trusts, 2 ed., 11, 12; 20 HARV. L. REV. 232.

⁴ Cf. 13 HARV. L. REV. 143. See Ames, Cas. Trusts, 2 ed., 17, 18.

⁵ Commercial Bank v. Armstrong, 148 U. S. 50; Richmond First Nat'l Bank v. Davis, 114 N. C. 343. See 15 HARV. L. REV. 79; 9 *ibid.* 428.

of a deposit of a note or check for discount. The bank gets the legal title by the indorsement.⁶ From first to last the results are founded on the proposition that by indorsement of the paper the legal title passes. This has nothing to do with the amount of other funds of the depositor held by the depository. Whether the latter is a *bona fide* purchaser is therefore not a question of legal title, but of consideration. And an examination of the cases discussed in the principal article will show that the latter is the real bone of contention.⁷

The giving of credit to the depositor in such a case is really a promise by the bank to pay out money to him at his call. It is supported by good consideration, namely, the receipt of the title to the paper, and seems to be part of a valid contract. It is difficult to see why one who has thus become bound to do a thing has not given value as much as one who has actually done something.⁸ The courts, however, do not generally take this view, and the majority are therefore inclined to hold that the depository bank is not a *bona fide* purchaser unless it gives some consideration other than a mere credit to the amount of the proceeds of the paper.⁹

THE PREFERENCE GIVEN TO THE LEGAL ESTATE OVER THE EQUITABLE. — Probably no rule of law which has to deal with cases where one of two innocent parties must inevitably suffer can hope to give entire satisfaction. In a recent article Mr. Edward Jenks criticizes the rule that a conveyance of the legal title to a purchaser for value without notice cuts off prior equities. *The Legal Estate*, 24 L. Quar. Rev. 147 (April, 1908). The doctrine criticized is established by authority,¹ and the article amounts to a suggestion that the law should be changed.

The author regards this rule as an instance of undue preference for the legal estate over the equitable. He mentions other instances, such as the refusal of courts to allow the equitable owner the right to possession, and the differences in form between conveyances of legal estates and conveyances of equitable. The author also maintains that the doctrine of tacking is another unfortunate result of such preference, and goes on to show that historical reasons, such as the requirement of public services and other burdens from the one seised, and the notoriety of transfers by seisin, which justified this preference originally, no longer exist.

If a trustee in breach of trust conveys the *res* to a purchaser for value without notice, the purchaser is protected; but if the trustee merely contracts to convey the *res* to such purchaser, the *cestui* is protected. Mr. Jenks thinks the accident of the purchaser's having acquired the legal title turns the decision without affecting the merits and therefore that the prefer-

⁶ *Burton v. United States*, 196 U. S. 283; *Cragie v. Hadley*, 99 N. Y. 131.

⁷ See *Dykman v. Northbridge*, 80 Hun (N. Y.) 258; *City Deposit Bank v. Green*, 130 Ia. 384; *Lancaster Nat'l Bank v. Huver*, 114 Pa. 216.

⁸ *Parker v. Crittenden*, 37 Conn. 148. This principle has been applied to promises of marriage. *Smith v. Allen*, 5 Allen (Mass.) 454; and to a few other transactions. *Ex Parte Golding*, 13 Ch. D. 628; *West v. Williams*, [1898] 1 Ch. 488. *Contra*, *Eversdon v. Mayhew*, 65 Cal. 163; *Dean v. Anderson*, 34 N. J. Eq. 496.

⁹ *Central Nat'l Bank v. Valentine*, 18 Hun (N. Y.) 417; *Albany County Bank v. People's Ice Co.*, 92 N. Y. App. Div. 47, 55; *Manufacturer's Nat'l Bank v. Newell*, 71 Wis. 309; *Citizens' State Bank v. Cowles*, 180 N. Y. 346.

¹ *Lea v. Copper Co.*, 21 How. (U. S.) 493.

ence for the legal estate is purely arbitrary. In reality it is founded on a different and quite fundamental principle, namely, that equity will take nothing from an innocent purchaser for value.² And this, it seems, should apply to equitable interests, as well as to legal.³ In the cases referred to, where the trustee has committed a breach of trust, and the purchaser has acquired the legal title, the court must decide whether it shall take from him something acquired for value and in good faith; but if he has not acquired the title, the court must decide whether it shall help him to get it, when that can be done only by ordering the trustee to commit a further wrong. These questions are hardly so similar that a distinction made between them can be called arbitrary. Moreover it is doubtful whether the situation would be improved by the adoption of Mr. Jenks' suggestion, that the *cestui* bear the loss in every case, or that the loss be divided equally between him and the purchaser. It would not be just for the *cestui* to bear the loss in all these cases indiscriminately. It is true the trustee is the apparent owner, and one who acquires title from him for value without notice should be protected against the *cestui*. But one who pays the trustee without getting title stands in no better position than the *cestui*. In fact his position is worse, because, unless he gets the legal title he gets nothing, for the equitable interest is in the *cestui*, and the trustee cannot convey it away. It follows that the author's suggestion that the loss be borne equally by the *cestui* and the purchaser would in every case be unjust to one or the other. The present rule seems as just as circumstances permit, and is likely to stand.

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- ARREST OF HIS PRINCIPAL BY THE BAIL. *Anon.* Arguing that such arrest may be made in a state other than where the bond is given, and the bail may transfer him without infringing his constitutional rights. 67 Cent. L. J. 1.
- BRITISH SOCIALIST LABOR PARTY, THE. *Edward Porritt.* A study of the party's methods, and its increasing power. 23 Pol. Sci. Quar. 468.
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- CONFLICT OF CONTROL OF CORPORATIONS. *Anon.* Arguing against centralization of the control of corporations in Canada. 44 Can. L. J. 249.
- CONSTITUTIONALITY OF THE PROPOSED INTERNATIONAL PRIZE COURT — CONSIDERED FROM THE STANDPOINT OF THE UNITED STATES. *Thos. Raeburn White.* Discussing the possible removal by appeal of cases from the United States Courts to the Prize Court. 2 Am. J. of Int. L. 490.
- CONVENTION FOR THE ADAPTATION OF THE PRINCIPLES OF THE GENEVA CONVENTION TO MARITIME WARFARE. *Simeon E. Baldwin.* A translation of Professor Renault's admirable report to the Second Peace Conference. 2 Am. J. of Int. L. 295.
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- EASEMENTS ACT WITH SPECIAL REFERENCE TO ALTERATIONS OF THE LAW MADE THEREBY. *R. B. Vichell.* Pointing out how the common law is changed by statute in India. 18 Madras L. J. 165.

² See *Colyer v. Finch*, 5 H. L. Cas. 905, 920.

³ See 1 HARV. L. REV. 1.

- ECONOMICS FROM A LEGAL STANDPOINT. *H. W. Humble*. 42 Am. L. Rev. 379.
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- EQUALITY OF STATES AND THE HAGUE CONFERENCES, THE. *Frederick Charles Hicks*. A consideration of how votes at the Hague Conferences should be apportioned among nations. 2 Am. J. of Int. L. 530.
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- HAGUE CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR. *Charles Cheney Hyde*. 2 Am. J. of Int. L. 507.
- HOW THE STATES HAVE FARED DURING THE LAST DECADE IN THE SUPREME COURT OF THE UNITED STATES. *C. H. Alexander*. Showing that the court has prevented encroachment by Congress on state affairs. 41 Chi. Leg. N. 41.
- IMPERIAL COURT OF APPEAL. *Anon.* Advocating a single court of appeal for the British Empire. 28 Can. L. T. & Rev. 495, 613, 712.
- IS IT USURPATION TO HOLD AS VOID UNCONSTITUTIONAL LAWS? *William G. Hastings*. 20 Green Bag 456.
- JURISDICTION IN DIVORCE. *J. Arthur Barratt*. Discussing English law as to American divorces. 36 Nat. Corp. Rep. 486.
- LABOR QUESTIONS IN THE COURTS OF MASSACHUSETTS. *Arthur March Brown*. A review of Massachusetts decisions on the questions. 42 Am. L. Rev. 706.
- LAW AND EQUITY IN FEDERAL COURTS. *Thomas A. Street*. Advocating that law and equity be kept distinct, but under one system. 12 Law N. (Northport) 65.
- LEGACIES ON IMPOSSIBLE OR ILLEGAL CONDITIONS PRECEDENT. *Roscoe Pound*. Discussing the Roman law, Civil Law and English and American decisions on the subject. 3 Ill. L. Rev. 1.
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- LIABILITY OF BANK COLLECTING COMMERCIAL PAPER. *George I. Woolley*. 12 Bench and Bar 100.
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- MAY A STATE, IN THE EXERCISE OF THE POLICE POWER, PROHIBIT THE USE OF THE NATIONAL FLAG FOR ADVERTISING PURPOSES? *George A. Lee*. 67 Cent. L. J. 3.
- MODERN LAW OF EVIDENCE AND ITS PURPOSE. *Charles Frederic Chamberlayne*. 42 Am. L. Rev. 757.
- NEEDS OF THE RAILROADS, THE. *Logan G. McPherson*. 23 Pol. Sci. Quar. 440.
- NOTABLE DECISION, A. *Clarence R. Martin*. Supporting a recent Indiana decision which held that a court will consider the constitutionality of a statute though it is not questioned by parties and that a statute applying only to counties of a given population is unconstitutional. 42 Am. L. Rev. 641.
- ORIGIN AND USE OF INJUNCTIONS, THE. *Frederick Dwight*. 31 N. J. L. J. 261.
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- PRESIDENT'S ADDRESS, THE. (American Bar Association, 1908.) *Jacob M. Dickinson*. 20 Green Bag 483.
- PROPOSED INTERNATIONAL PRIZE COURT AND SOME OF ITS DIFFICULTIES. *Charles Noble Gregory*. Showing how difficulties would arise from the fact that different nations have different laws. 2 Am. J. of Int. L. 458.
- PURPOSE AND CHARACTER OF EMPLOYERS' LIABILITY LEGISLATION IN THE UNITED STATES. *C. T. Bond*. A discussion of recent legislation on the subject. 66 Cent. L. J. 483.
- RECENT DEVELOPMENTS IN THE LAW RELATING TO INTERSTATE COMMERCE. *Morris M. Cohn*. 42 Am. L. Rev. 666.
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- REGULATION OF TELEGRAPH COMPANIES. *M. J. Gorman*. A summary of the law in Canada and the United States. 28 Can. L. T. & Rev. 675.
- REVERSALS FOR "TECHNICAL" REASONS. *Thomas J. Johnston*. Citing statistics to show that the number of reversals is proportionately small. 12 Law N. (Northport) 105.

- RIGHTS OF ALIENS: A STUDY IN TREATY MAKING. *Edwin Maxey*. An account of the discussions at a Latin-American conference, and conclusions based thereon. 16 *Am. Lawyer* 171.
- RIGHTS OF SECOND MORTGAGEES REGARDING POSSESSION. *R. M. P. Willoughby*. Suggesting the advisability of providing that the second mortgagee shall have right to take possession under certain circumstances. 24 *L. Quar. Rev.* 297.
- SALVAGE AWARDS. *A. R. Kennedy*. A statement of English law on the subject. 33 *L. Mag. & Rev.* 301.
- STRIKING OUT SHAM DEFENSES. *George I. Woolley*. Stating the law on the subject in New York. 13 *Bench and Bar* 57.
- TAXATION OF INHERITANCES, THE. *Joseph F. M'Cloy*. A consideration of the legislation recommended by President Roosevelt. 40 *Chi. Leg. N.* 347; 53 *Oh. L. Bul.* 159.
- VALIDITY OF A STATUTE PROVIDING THAT ACCEPTANCE FROM RELIEF ASSOCIATION SHALL BE NO BAR TO AN ACTION FOR DAMAGES. *F. A. Beecher*. 67 *Cent. L. J.* 143.
- WHEN IS A BANK THE *bona fide* OWNER OF A CHECK LEFT FOR DEPOSIT OR COLLECTION? *Albert S. Bolles*. 56 *U. P. L. Rev.* 375. See *supra*.

II. BOOK REVIEWS.

INTERNATIONAL LAW APPLIED TO THE RUSSO-JAPANESE WAR. By Sakuyé Takahashi. American Edition. New York: The Banks Law Publishing Company. 1908. pp. xviii, 805. 8vo.

Professor Takahashi was legal adviser to the commander-in-chief of the Japanese fleet during the Chino-Japanese war, and in 1899 prepared a book on the "Cases on International Law during the Chino-Japanese War." He was a member of the legal committee in the Department for Foreign Affairs during the Russo-Japanese war. This experience especially qualified him to set forth the Japanese view upon the international questions which arose in these wars. During the Chino-Japanese war the Japanese endeavored to observe scrupulously the rules of international law, as they were desirous of full recognition in the family of nations, and anxious at that critical period to show the justice of their claim to such recognition. The Russo-Japanese war coming between the First Hague Conference of 1899 and the Second Hague Conference of 1907 furnished illustrations of the application of the rules of the Conference of 1899, and problems for the consideration of the Conference of 1907. Professor Takahashi's book referring to the conventions of both Conferences shows the rapid development of international law within this brief period.

Many matters which were unsettled at the time of the Chino-Japanese war in 1894 were settled by the Hague Conventions of 1899, and many matters still unsettled at the time of the Russo-Japanese war of 1904 were determined by the Hague Conventions of 1907. An example of this is fully set forth in Part I, "The Outbreak of War, and its Effects." The Russo-Japanese war had begun without a declaration, as had many other wars within the last two hundred years. The Russo-Japanese incident led to much discussion. The Second Hague Conference provided for declaration before the opening of hostilities. Other matters emphasized as unsettled at the outbreak of the Russo-Japanese war, such as the granting of days of grace to enemy merchant vessels at the outbreak of hostilities, and the treatment of belligerent vessels in neutral ports, received attention at The Hague in 1907.

Part II deals with "Laws and Customs of Land Warfare." This section of the book is of the nature of a description of the conduct of the Russo-Japanese hostilities on land as illustrative of the modern development of international law. Part II may profitably be read with Professor Ariga's "La Guerre Russo-Japonaise au point de vue continental et le droit international," issued in 1908.

Parts III, IV, and V, constituting about 500 of the 800 pages of Professor Takahashi's book, are most valuable contributions to the data of international law. Part III deals with "Laws of Naval Warfare." Part IV deals with

"Neutrality." Part V is devoted to "New Cases on Prize Law added by the Decisions of the Japanese Prize Courts." In these divisions of the book many of the unsettled questions of the law of war on the sea are considered. Many documents ordinarily inaccessible or difficult of access are gathered by Professor Takahashi. In the chapter on "Destruction of Merchantmen" it is distinctly recognized that the Japanese regulations of 1904 allowed greater freedom in the destruction of merchant vessels than did those of 1894. Neither the Japanese nor Russian rules of 1904 make any distinction between the destruction of enemy and of neutral vessels. The destruction of neutral merchant vessels by Russian war vessels caused much discussion and led to vigorous diplomatic protests. In the regulations of 1894 Japan followed the British regulations restricting the destruction of neutral merchant vessels. It seems unfortunate that a less liberal position should have been taken in 1904, particularly as Professor Takahashi and others have found so much to criticise in the conduct of the Russian war vessels under regulations somewhat similar to the Japanese.

Chapter V of Part III gives a very comprehensive account of a new and important subject in international relations, — the treatment of newspaper correspondents in time of war. Professor Takahashi agrees with the conclusion that in the future newspaper correspondents should be entirely subject to military control, and if expedient may be excluded from the area of military operations, since the diffusion of news must be secondary to the attainment of the military object of the war.

The full discussion of the subject of internment of belligerent war vessels and their crews in neutral ports given in Chapters I, II, and III of Part IV shows how rapidly new problems have developed new practices in international relations, and how a principle scarcely thought of a few years ago has been generally accepted.

The questions in regard to contraband also gave rise to much discussion, as shown in Chapter IV. The Japanese categories of absolute and conditional contraband followed the American and British precedent. The Russian category, making a single list of articles regarded as contraband, followed the European continental precedent. The discussions upon contraband since the Russo-Japanese war and stimulated in part by it have shown the widest diversity of opinion. Great Britain went so far in the instructions to her delegates to the Second Hague Conference as to advocate the abolition of contraband altogether, while some states on the other hand would make the list more inclusive.

Part V contains the Japanese prize court regulations and the organization of the prize courts and the decisions upon cases which arose during the war. In the decisions the tendency to follow precedent is naturally less marked than in English and American decisions. The reference to general principles is more common, and the final conclusions are often in the nature of dicta.

The appendices contain material relating to the war, such as regulations governing captures at sea, the treaty of peace, etc., which add to the value of the book for convenient reference.

A book containing so much material is worthy of a much fuller index than that which appears on pages 801-805, and which is not always accurate, *e.g.* reference to *Arugun* (misspelled) as page 625 should be page 573. Occasional infelicities in expression and a pro-Japanese point of view are to be expected. This book upon the international law of the Russo-Japanese War, together with Professor Takahashi's "Cases on International Law during the Chino-Japanese War," and Professor Ariga's "*La Guerre Sino-Japonaise au point de vue de droit international*," and "*La Guerre Russo-Japonaise au point de vue continental et le droit international*," furnishes a most valuable collection of material as a basis of judgment upon the course of development of international law in the Far East. Professor Takahashi has in the preparation of this new volume placed all students of international law under obligation, particularly because he has furnished to them a large amount of documentary material rather than a mere presentation of his personal opinions upon the international law as applied during the Russo-Japanese war.

G. G. W.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXII. For the year 1907. Year Books of Edward II. Volume IV: 3 & 4 Edward II; 1309-1311. London: Bernard Quaritch. 1907. pp. xlii, 263. 4to.

This volume is in a way a memorial to the late Frederick William Maitland. A recent portrait of him forms the frontispiece, and the preface contains a brief sketch of his life. The text was prepared by him before his death with his usual minute care, after a laborious collation of the manuscripts (thirteen in number for this year); but the Introduction was prepared by Mr. G. J. Turner. The excellence of his work gives us hopeful assurance of the continuance of this invaluable series. In the Introduction several interesting questions are discussed and the evidence in favor of the conclusion reached is well marshalled. The appointment of judges is considered, and the conclusion reached that they were appointed partly from among lawyers in practice at the bar and partly from among the clerks of the courts. An interesting discovery is that the Common Bench in the thirteenth century sat in two divisions,—one for settling the pleadings (that is, for determining questions of law), and the other for trying issues; and that the judges were permanently assigned to one division or the other.

As to the cases here reported, perhaps the most interesting fact is that nearly four-fifths are newly published, so imperfect was the manuscript from which Maynard's Year Book was printed. A few points of special interest may be mentioned. The growing recognition of precedent as establishing the law is indicated by a statement of Chief Justice Bereford (p. 161): "By a decision on this avowry we shall make a law throughout all the land." The picturesque method of speech which made Bereford address a persistent lawyer, "You wicked caitiff" (p. 134) would arouse a certain envy in many a modern judge whom custom denies such freedom of expression. On one occasion a jury was unable to agree. Stanton thereupon ordered them to be put in a house till Monday without food and drink. But on the same day, about vesper-time, they agreed, and thereupon they were allowed to eat, the verdict, however, not being returned until the Monday (p. 188). An attorney was imprisoned for abuse of process in suing out process merely for delay, and was not allowed bail; Stanton charging him to "stay in gaol until you are well chastised" (p. 195). An attempt to hold a bailiff on a writ of waste was not allowed, on the ground that the proper action against him was account (p. 136).

Most of the cases are of real actions, and possess only an historical interest to students of law. There is, however, a case reported from the King's Bench of ravishment of wife, in which seisin as wife was recognized as giving the husband *de facto* an indisputable standing in the king's courts (*Gyse v. Baudewyne*, p. 4). In the case of *Petstede v. Marreys*, in the King's Bench (p. 29), a woman to whom one third of the beasts in a park had been assigned in dower was allowed to maintain trespass for taking the beasts against the person seised of the land; the court saying that she was "seised of the third part of the profit *par my et par tout*," and could have no other writ.

Altogether this is one of the most interesting and valuable of the series. It is to be greatly hoped that the lamented death of Professor Maitland will cause no interruption in the publication of the succeeding years.

J. H. B.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By Frederick H. Cooke. New York: Baker, Voorhis and Company. 1908. pp. xcii, 302. 8vo.

This is a thoughtful and useful book. Although the subject is difficult and the decisions are irreconcilable, the author has not taken refuge in quotations from opinions or in summaries of decisions. On the contrary, he has attempted to derive from the words of the Constitution and from the better-reasoned cases a consistent theory. Such an undertaking is obviously dangerous, for the reader must be protected against believing that the author's theory always represents unquestioned law; but the author has fully appreciated the danger and has fur-

nished the necessary protection, simultaneously developing his theory and presenting clearly the actual decisions. His independence is shown throughout. For example, he calls the "original package" doctrine, notwithstanding the weight of Marshall's name, anomalous and absurd (§ 17); and he questions *Swift v. United States* (§ 24); and he believes that decisions commonly based upon the Commerce Clause are sometimes properly explainable by the federal admiralty and maritime jurisdiction (§§ 26a, 43), or by the position of the Indians as wards of the nation (§ 30); and he disapproves both *Bowman v. Chicago & Northwestern Railway Co.* and *In re Rahrer* (§§ 98-99). These are only a few instances of the free and thoughtful discussion which gives the book a strong claim to respect. The treatment of taxation is especially acute (§§ 108-116). The whole volume deserves to be read by any one able and willing to read attentively; but the author's mode of thought and of expression will not attract a careless or hasty reader. For the lawyer who is simply in search of authorities, the volume performs the great service of collecting in the foot-notes — usually with some indication of the peculiarities of each case — an unusually complete collection of federal and state decisions.

E. W.

GREAT AMERICAN LAWYERS. Edited by William Draper Lewis. Volumes I-V. Philadelphia: The John C. Winston Company. 1907-1908. pp. xxxviii, 472, 533, 560, 546, 531. 8vo.

In the preface to the first volume of the Great American Lawyers Professor Lewis says: "The aim of this work is not to present a mere collection of biographical sketches of great American judges and lawyers of the past, but to give a history of the development of legal institutions. . . ." Further, in outlining the field to be covered by the biographies he has divided the whole into four distinct classes — members of the legal profession who have a permanent national reputation; those who have permanently impressed the jurisprudence of their respective states; those who have "through their teaching or by their writings produced, either a distinct effect on the law, or have been instrumental in stimulating new methods of legal thought and work"; and those whose lives make the collection "give as complete a history as possible of the legal profession in America, and the development of our legal institutions."

Although a collection covering such a large field should be looked upon as a unit and should not be judged by a fragment, the five volumes which have already appeared seem a fair basis upon which to form an opinion as to the probable success of the editor's undertaking. To the extent of these first volumes Professor Lewis has shown steadfast adherence to his purpose and has proceeded far enough to promise the complete fulfillment of his project as outlined. The biographies as a whole are so arranged as to show the historical development of the law in America both in the wide field of constitutional law and in the narrower but no less interesting field of the jurisprudence of many of the individual states. As a result of the necessary limitations in space each sketch is of much less extensive scope than the usual historical biography. Nevertheless, within the prescribed limits it has been possible to give a complete picture of the position of each individual in the legal world, large or small, and at the same time to portray the human characteristics of each man in vivid and attractive fashion. Every member of the legal profession, in active practice or in the field of legal instruction, will undoubtedly read the collection with interest and enjoyment. Those brilliant members of the bar, the prominent features of whose lives every reader of American history knows to some extent, are depicted in a new light — that of their legal attainments and their position at the bar. Of such men may be mentioned Patrick Henry, John Marshall, Daniel Webster. The sketches of those other lawyers, less well known outside the legal profession though of eminence in their particular field, such as William Tilghman, James Kent, Henry Wheaton, Lemuel Shaw, Reverdy Johnson, Charles O'Connor, David Dudley Field, are also of great interest to all and

a source of inspiration to the student and to the younger members of the bar. Space will not allow even an enumeration of the names of the fifty-nine subjects of the biographies or a criticism of the individual sketches. It is, however, possible to say that the work of the biographers as a whole is of a very high character of excellence, as is only to be expected when the eminence of the contributors is considered. Professor Lewis's edition of *Great American Lawyers* will undoubtedly rank as one of the first sources of American Legal history.

J. S. S.

THE MASSACHUSETTS LAW OF LANDLORD AND TENANT. By Prescott F. Hall. Second Edition. Boston: Little, Brown, and Company. 1908. pp. lxii, 619. 8vo.

The prediction made in the review of the first edition of this book, 13 HARV. L. REV. 314, that it would prove invaluable as a manual of ready reference, has been fulfilled. In 1903 a forty-seven page supplement, including the more recent Massachusetts cases, the references to the Revised Laws, and the legislation of 1903, was found necessary. And now a new edition giving a complete index of the decisions and statutes through 1907 has been demanded and published. The original arrangement has not been departed from in this second edition; but the topics, notably the sections on "Construction of Express Covenants and Provisions," and on "Bankruptcy and Receivership," are more fully dealt with. The text has been subdivided, and its use facilitated by a large increase in the number of section headings, all set in bold-faced type. Some dozen new forms are added to the useful appendix prepared for the earlier edition; and a convenient index of forms appears for the first time.

The local character of the work is, of course, still maintained. Much of Massachusetts real estate law peculiarly invites theoretical discussion. But Mr. Hall's purpose is primarily to serve the active practitioner by stating exhaustively the law, as far as possible in the language of the court and with sufficient fulness to save, in many instances, a resort to the original reports; and this aim, while not at variance with scientific discussion of legal doctrines, is best secured by the author's limiting himself to his admirable summary of the law as it is. The book should be on the shelf of every lawyer, trustee, and real estate broker in the Commonwealth.

J. W.

SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY. By various authors: compiled and edited by a Committee of the Association of American Law Schools. In three volumes. Vol. II. Boston: Little, Brown, and Company. 1908. pp. viii, 823. 8vo.

The second volume of *Select Essays* will probably be consulted more often than the first. It is made up of twenty-five essays on the history of particular topics of the Law, grouped under the sub-topics of Sources, the Courts, Procedure, and Equity. There also are two valuable appendices containing a list of sources for continental mediæval law, and of sources for American colonial law.

Further notice of this volume is deferred until the appearance of Vol. III.

N. A.

THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, May-September, 1787. As recorded by James Madison. Edited by Gaillard Hunt. In two volumes. New York and London: G. P. Putnam's Sons. 1908. pp. xvii, 392; vi, 461. 8vo.

The publishers' summary is correct and comprehensive: "These two volumes contain an historical document of the first importance—James Madison's com-

plete record of the Constitutional Convention. This record is the only continuous chronicle of the proceedings of the Convention, and was kept by Madison himself in a kind of shorthand. The notes to this book [edition] include a comparison of Madison's journal with the records kept, respectively, by Robert Yates, Rufus King, and William Pierce."

It should be unnecessary here to review Madison's Journal. Whoever would know the genesis of American constitutional law must read it. Many of the questions that today perplex the nation are here foreshadowed in an almost uncanny way.

The present edition is well constructed. The insertion of the fragmentary comments of Yates, King, and Pierce as footnotes throws interesting sidelights on the main text and obviates burdensome appendices. The type is clear, but the words in many of the lines are unduly crowded, — a fault common in recent books. There is an adequate index. The edition is undoubtedly the most accurate and readable yet published.

H. S.

THE GROUNDS AND RUDIMENTS OF LAW. By William T. Hughes. Chicago: Usona Book Co. 1908. pp. xix, 356.

DATUM POSTS OF JURISPRUDENCE. By William T. Hughes. Chicago: Usona Book Co. 1907. pp. xiv, 250.

These two books may be considered together, for the motto of both, *Melius petere fontes quam sectari rivulos* (it is better to seek the fountains than to wander down the rivulets), sets forth their joint purpose. The author, to use his own figure, has sought to write a geography of the law. The "Grounds and Rudiments" describe the unknown land, the "Datum Posts" represent the illustrative maps. The fundamental principles of the law represent the continents, the maxims represent the countries, the great cases are the provinces, and the lesser cases the cities, towns and hamlets, according to their magnitude. The scheme of the "Grounds and Rudiments" is indicated by some of its chapter headings: Fundamental Principles, Conserving Principles of Procedure, Code Procedure, Practice Acts, Collateral Attack. To support his necessarily brief and general statements the author refers to the "Datum Posts," which consists of the cases which he has selected as leading, arranged in alphabetical order, tersely stated and surrounded by groups of lesser cases depending upon them. The two books taken together might be described as a mercator's projection of the law upon a small scale.

Certainly this method of treating the law is novel. To one who wishes to correlate the different branches of the law into a unit it will be of great assistance, whether he agrees with the author or not. But how far it will help to solve the immediate problems of every day is more open to doubt. A map of the world increases one's general knowledge, but it is a poor guide from Boston to New York. In those circumstances an ordnance map of the immediate region (represented here by the more usual text book) is more to the purpose. Yet the author deserves the thanks of brother lawyers for striving to chart, even in general fashion, a land which each year becomes more thickly covered with a forest of conflicting decisions.

E. H. A., jr.

PACIFIC BLOCKADE. By Albert E. Hogan. Oxford: At the Clarendon Press. 1908. pp. 183.

FRANCE AND THE ALLIANCES. By André Tardieu. New York: The Macmillan Company. 1908. pp. x, 314.

STREET RAILWAY REPORTS ANNOTATED. Volume V. Albany: Matthew Bender and Company. 1908. pp. xlvi, 964. 8vo.

IDEALS OF THE REPUBLIC. By James Schouler. Boston: Little, Brown, and Company. 1908. pp. xi, 304.

- HISTORY OF THE ROMAN-DUTCH LAW. By J. W. Wessels. Grahamstown Cape Colony: African Book Company, Limited. 1908. pp. xv, 791. 8vo.
- PROBLEMS OF CITY GOVERNMENT. By L. S. Rowe. New York: D. Appleton and Company. 1908. pp. 358.
- THE VICTORIAN CHANCELLORS. By J. D. Attay. Volume II. London: Smith, Elder, and Company; Boston: Little, Brown, and Company. 1908. pp. x, 476.
- AMERICAN LAW. By James DeWitt Andrews. Second edition. In two volumes. Chicago: Callaghan & Co. 1908. pp. xxii, 2026.

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NO. 3.

SPECIFIC PERFORMANCE, INJUNCTIONS, AND DAMAGES IN THE GERMAN LAW.

I. RIGHTS AND CLAIMS.

OLDER systems of law developed the two following maxims:

1. Not every right as such is entitled to be enforced by the courts, but the courts give their assistance in cases only where the right may be brought under one of the prescribed forms of procedure. Such was the idea of the Roman law, where rights could be enforced only if the magistrate found them to fit in one of the prescribed forms. That law was based on a system of actions divided into actions *in rem* and *in personam* with numerous subdivisions, and the parties who appeared before the magistrate had to obtain from him for the enforcement of their rights one of those forms. The same idea, namely, that a right may not be enforced unless it fits in one of the legal forms, is the basis of the English division of actions into *assumpsit*, *replevin*, *detinue*, and the like.

2. The enforcement of a right by the court does not mean that the plaintiff is entitled to obtain the object of his right specifically, but as a rule his compensation in money is sufficient to do justice. Therefore a purchaser cannot sue for the delivery of the thing purchased if the seller does not perform his obligation, but he must be satisfied with compensation in money. Likewise the master cannot sue his servant for the performance of services; the person who has suffered an injury to his property cannot sue for specific reparation; but in all such cases an equivalent in money must be accepted by the injured party. Such was the principle of the Roman law in its older periods,¹ and such is the rule governing the English law of today.

¹ 2 Crome, *Bürgerliches Recht*, 18; and as to damages, 2 Crome, 66; 2 (1) Dernburg, *Bürgerliches Recht*, 77. The references to Dernburg are given for vols. 1 and 3 from the third edition, for vol. 2 (parts 1 and 2) from the "first and second" edition.

The conception of the modern German law is quite different. The two leading principles of it are that every right may be enforced by the courts, and that the purpose of such enforcement is the creation of the condition which would exist if the right was complied with voluntarily and without judicial help. In other words, a person has as many actions as he has rights recognized by the law; the right to sue is nothing else than the formal aspect of the right itself. Furthermore, the purpose of a lawsuit is to create a situation or condition which would exist if no violation or infringement of a right had arisen at all. For instance, a person has hired a horse which is not delivered to him and he sues for delivery; or, he has entered into a contract of partnership, his partner does not fulfill his part of the agreement, and he sues for specific performance; or, an employee has bound himself not to compete with his master, he breaks his contract, and his master seeks to enjoin him; or, finally, some one by trespassing on my property has injured it and I sue him to repair the damage.

The right to sue is therefore the formal side of the right itself. The beginning of a lawsuit, however, requires generally more than the mere existence of a right. The right of ownership, for instance, gives me the full power to use a thing in any way I wish and to prevent other persons from interfering with my right. The power which I have over the thing must be respected by everybody. But my right to sue does not exist until my right is interfered with by a given individual, and it is therefore dependent upon a personal relation between two conflicting parties.¹ In case of relative or obligatory rights the situation is different. Here by the mere creation of the right the two persons concerned, namely, the creditor and the debtor,² are known, and the creditor's right to sue the debtor is given as soon as the obligation is due.³

Thus the enforcement of every right requires a relation between at least two individuals. This right of enforcement arising out of

¹ 1 Crome, 179.

² The terms "creditor" and "debtor" are used here, according to the German terminology, for the person who is entitled to performance (including payment of money) and the person who is bound to perform.

³ No violation of the obligatory right is necessarily required for its enforcement. This becomes apparent in the following case. A creditor may make a loan of money to a debtor on the condition that he may claim it back at any time he likes. The creditor in such case can sue the debtor immediately and without refusal on the part of the debtor, no breach of contract by the debtor being required for such lawsuit. 1 Crome, § 35, note 8. Successful plaintiffs who might have obtained their rights without suit are charged with all the expenses of the lawsuit. Code Civ. Proc., § 93.

private rights is called by the German Civil Code a claim (*Anspruch*), and the claim is defined as the right to demand an act or forbearance from another person.¹ The claim based on relative or obligatory rights (contracts, *quasi*-contracts, torts, *quasi*-torts) is, in fact, the right itself, but in the case of absolute rights (rights in things, like ownership or mortgage, family rights, inheritance rights, rights of authorship, patent rights, and the like) a claim does not exist until some one has infringed the right. Absolute rights contain unlimited possibilities for claims, but after a claim arises therefrom its nature is the same as in the case of obligatory rights.²

Every right may be enforced and become the foundation of a claim. There are, however, exceptions where rights are recognized by law, payments on account of such rights are valid and good, performance of such rights is considered as contractual performance, but, nevertheless, the law refuses to give claims for these rights and to grant their enforcement (the so-called imperfect obligations). For instance, manufacturers and laborers are allowed to enter into all kinds of agreements to obtain most favorable conditions for manufacture on the one hand and labor on the other hand; and therefore a large number of trusts and labor unions exist in Germany. But all members of such agreements are entitled to withdraw at any time; no lawsuits can be based on relations arising from trusts or trade unions; no damages can be obtained for breach of such agreements, and neither trusts nor trade unions have the right to enforce any fines against their members.³ In the same way, contracts with marriage brokers, or obligations created by gaming or betting, are good and valid, and payments made in performance of such contracts cannot be recovered as unjust enrichment, but no possibility of suing is given on account of such contracts.⁴ Besides these imperfect obligations, it is provided for many claims mainly arising from the family law, for instance for disputes between husband and wife, that these

¹ Civil Code, § 194.

² Concerning the theory of the *Anspruch* (claim) cf. 1 Windscheid-Kipp, Pandekten, §§ 43-46; 1 Dernburg, § 42; 1 Crome, § 35; 1 Planck, Kommentar z. B. G. B., 3 ed., 52; 1 Standinger, Kommentar z. B. G. B., 3 ed., 585, 586.

³ Trade-Regulation Act (*Gewerbeordnung*), § 152. Cf. 1 von Landmann, Kommentar z. G. O., 5 ed., 541-551.

⁴ Civil Code, §§ 656, 762. A lottery contract is binding and enforceable if the lottery is ratified by the government; in all other cases the provisions of § 762 apply. Civil Code, § 763.

claims shall be settled not by lawsuit but by *ex parte* decree of the guardianship court.¹

For the enforcement of a right it is usually supposed that the claim is due, and therefore not dependent on condition or limitation of time. However, since 1900 lawsuits for future or conditional performance might be instituted in the following cases.²

1. Claims for loaned money due at a future date. If the defendant immediately acknowledges the plaintiff's right and the plaintiff had no immediate occasion for suing, the court will charge the plaintiff with all costs, although he is given title against the defendant.³

2. Complaints demanding the surrender of the possession of a house or a piece of land under lease at the future termination of said lease. Before 1900 lessors of houses or lands were often greatly inconvenienced in cases where their lessees were not willing to give up the leased property. The creditor had to wait until the termination of the lease and could not begin his lawsuit before this time. Lessees often used defenses of which the only purpose was to gain time at the expense of the lessor and which, after evidence was taken, were shown to be frivolous. Today under the new provisions the lessor may obtain a judgment before the termination of the lease and execute his judgment immediately after the end of the contract.⁴

3. In case of periodical income or debts to be paid by installments suit may be brought for installments due after the time at which judgment is given.

4. In all cases dependent upon condition⁵ an action may be brought for future performance if, under the circumstances, the plaintiff has some reason to believe that the debtor will not perform at the right time.

Under these new provisions the creditor is entitled to execute his judgment against the debtor immediately after the claim is due.⁶

II. ENFORCEMENT OF CLAIMS.

The purpose of the enforcement of claims is, as was said above, to create a condition which is in accordance with the right from

¹ Cf., for instance, Civil Code, §§ 1357, 1358, and the writer's article, "Non-Contentious Jurisdiction in Germany," in 21 HARV. L. REV. 479.

² Code Civ. Proc., §§ 257-259.

³ *Ibid.*, § 93.

⁴ *Ibid.* § 721.

⁵ 1 Gaupp-Stein, Kommentar z. C. P. O., 8 and 9 ed., 583, 584.

⁶ Code Civ. Proc., §§ 726, 751.

which the claim has sprung. For instance, an absolute right, like a patent, is violated; then the purpose of the claim is to stop further violations and to compensate the person injured for such infringement; after these purposes have been reached and the claims growing from the patent right satisfied, the condition corresponding to the patent right is re-established. Or, after a claim based on a relative right is enforced and, for instance, a contractor is condemned to build the house agreed upon, the contractual claim is satisfied.

As, therefore, the enforcement is merely the formal side of the right¹ and the method of enforcement completely corresponds to the claim which springs from the right, the question, in which cases specific performance is granted, in which cases injunctions and in which cases damages, has no fundamental importance in the German law. However, for the purpose of obtaining a comparative view of the law of this country, the function of the three mentioned methods of enforcement in the German procedure may be discussed.

1. *Specific Performance.* It is the remedy which corresponds to the claim of one person, the creditor,² against another person, the debtor, to do an affirmative act. In all cases, therefore, where the debtor is bound to do such affirmative act, the creditor has the claim for specific performance. Hence the creditor sues for the delivery of the thing purchased, for the construction of the house, for the rendering of services; the husband sues his wife who has left him for the restitution of his marital rights. The fact that the debtor refuses to perform has no effect on the creditor's claim and on his obtaining a judgment for performance. The way in which such judgment may be executed and the fact that perhaps it may become impossible to get satisfaction by execution do not deter the court from giving judgment.³ It follows that the claim for specific performance is barred only if the performance is or becomes impossible.

This is, however, only a general principle. As to its application, three questions arise. First: Is, by the impossibility of performance, the debtor's obligation entirely extinguished, or is it changed into an obligation to make compensation in damages? Second: Is the creditor, as long as the performance is not impossible, bound to claim performance, or is he under some conditions entitled to ask

¹ 1 Crome, 550; Windscheid-Kipp, *l. c.*

² Cf. above, p. 162, n. 2.

³ 2 Crome, 129; 1 Gaupp-Stein, 550.

for compensation in money instead of performance? Third: Is any claim for performance given against third persons who have obtained the object of the performance?

FIRST: *Impossibility of performance and the debtor's duties arising therefrom.* The Code distinguishes the impossibility of performance which existed at the time when the contract was concluded ("original impossibility") from the impossibility which happened later on ("subsequent impossibility"). And the Code further distinguishes between impossibility which is absolute and exists for everybody ("impossibility") and the impossibility which merely exists for the debtor and has its reason in his personal condition ("inability"). As a result of these distinctions, four combinations arise, namely: original impossibility, original inability, subsequent impossibility, and subsequent inability.¹

A. Original impossibility. "A contract for an impossible performance is void."² For instance, if A sells to B the city of Boston, such agreement has no effect at all. However, there are exceptions.

a. Claim for specific performance based on a void contract: "The impossibility of performance does not prevent the validity of the contract if the impossibility can be removed, and the contract is intended to be binding only if the performance becomes possible. If an impossible performance is promised subject to any other condition, precedent, or limitation of a definite time, after which it is to become binding, the contract is valid if the impossibility is removed before the fulfilment of the condition or the arrival of the time."³ For instance, a city intends to sell a public park as building grounds. Under this expectancy a real estate dealer A enters into a contract of sale with B concerning the park territory. The contract becomes valid and creates a claim for specific performance as soon as the city has offered the park to the private individuals.

b. Claim for full damages, based on a void contract. If a person enters into a contract the performance of which is impossible, and he expressly guarantees the performance, he is bound to compensate the other party for all damages.⁴ For instance a person sells a void patent guaranteeing its validity, he assigns a claim barred by the statute of limitation, and promises that the claim will

¹ 2 Planck, pp. 67 *et seq.*; 2 (1) Dernburg, pp. 128 *et seq.*; 2 Crome, pp. 33 *et seq.*, 121 *et seq.*

² Civil Code, § 306.

³ *Ibid.*, § 308.

⁴ 2 Planck, 118.

be satisfied; further, by legal presumption, "the seller of a claim or any other right warrants the legal existence of the claim or the right."¹

c. Claim for compensation for actual outlay, based on a void contract. "A person who, in concluding a contract for an impossible performance, knew or ought to have known that it was impossible, is bound to make compensation for any damage which the other party has sustained by relying upon the validity of the contract, not, however, beyond the value of the interest which the other party has in the validity of the contract. The duty to make compensation does not arise if the other party knew or ought to have known of the impossibility."² For instance, A asks a broker, B, to buy for him a given kind of bonds to be delivered at the end of the month. B accepts. A now makes arrangements to sell these bonds at the time of delivery and expects to make a profit of \$1000. His outlay on account of the business (travelling expenses, advertisement, and the like) is \$200. Later on the broker discovers that the kind of bonds ordered does not exist. He is on account of his negligence bound to compensate A for any outlay up to the amount of \$1000.

B. Original inability. The contract is valid, and a claim for specific performance may be based on it.³ For instance, a contractor agrees to build a house although he has neither sufficient means nor sufficient credit, or a boycott of the laborers against him personally at the time of the agreement prevents him from performing the contract; or a bookseller contracts to sell a book, although he is not the owner of the book, but has to order it from the publisher. In all such cases the contracts are valid, a direct action for specific performance is given, and the debtor is condemned unless he proves that no default can be imputed to him or his employees.⁴ "A debtor is responsible, unless it is otherwise provided,⁵ for willful default and negligence. A person who does not exercise ordinary care acts negligently.⁶ For instance, in the

¹ Civil Code, § 437.

² *Ibid.*, § 307.

³ 2 Planck, 68; 2 Crome, 160. *Contra*, 2 (1) Dernburg, 131, who gives the opinion that not a claim for specific performance but for full damages lies. However, as compensation in damages under the Code means restitution in kind (see below, *sub* 3), the differing opinion of this author does not, in most of the cases, give a different result from the opinion of the majority of writers. Differing, French Civil Code, art. 1599.

⁴ Civil Code, § 278.

⁵ For instance, a promisor of a gift, a finder of a thing lost, and others are responsible only for gross negligence. Civil Code, §§ 521, 968.

⁶ Civil Code, § 276.

foregoing illustration, the contractor would be excused from performance if he at the time of the conclusion of the contract had good reason to believe that the boycott of the laborers against him would shortly come to an end.

C. Subsequent impossibility. "The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance for which he is not responsible occurring after the creation of the obligation."¹ For instance, where a person has sold a house and before delivery the house is destroyed by fire without default of the seller, his obligation ceases. But "where the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance."²

The consequences of subsequent impossibility are therefore:

a. Either termination of the obligation, if the debtor is without default.

b. Or compensation by way of damages. Compensation by way of damages means, in the first place, restitution in kind (see below *sub* 3), but as this in case of impossibility cannot be done, pecuniary compensation takes place.

D. Subsequent inability. "If the debtor after the creation of the obligation becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible."³ Such subsequent inability arises, for instance, if after the conclusion of the contract a singer who made an engagement for a given evening catches a cold preventing him from performing, if the thing which the debtor was bound to deliver is stolen from him, if the outbreak of a strike of the laborers prevents the contractor from building the house or the coal mine from delivering the coal. However, merely temporary impediments do not, as a rule, create "inability" on the part of the debtor, and the loss of the title in the thing which he was bound to deliver has such effect only if he by the exercise of his contractual duties is unable to obtain the title back. Therefore, if the debtor has fraudulently transferred the title to a third person, he must undertake even disproportionate outlay to determine the third person to retransfer the title, and his inability to perform arises only if such efforts are without success.⁴

If the object of performance is designated only by species and

¹ Civil Code, § 275, par. 1.

³ *Ibid.*, § 275, par. 2.

² *Ibid.*, § 280.

⁴ 2 Planck, 69, 70.

delivery of an object of the designated species is possible, no inability to deliver is considered by law.¹ For instance, a man sells a given kind of wheat which is usually to be obtained in Chicago, but at the time of delivery the agreed kind of wheat is sold out in Chicago and the same kind can be obtained only in London or Montreal. The seller has to perform and order it from these places.

Now, as, under the provision mentioned above, the subsequent impossibility and the subsequent inability have the same effect, the consequence of the debtor's subsequent inability is

a. Either termination of the obligation, if the debtor is without default (he suddenly becomes sick, the thing is stolen from him without his negligence).

b. Or compensation by way of damages (the debtor has negligently or fraudulently conveyed the thing to a third person, who refuses to reconvey it, the contractor by his pretentious attitude to the laborers has caused them to strike). Compensation by way of damages means, in the first place, restitution in kind (see below *sub 3*), and only in the cases stated below, pecuniary compensation.²

In all cases *sub C* and *D*, if in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation.³ For instance, the house sold and not yet delivered is destroyed by fire; the buyer has a claim to the insurance money. Or the debtor sells the object, which he was bound to deliver, to a third person; the creditor has a claim to the purchase price.⁴

SECOND : *Is the creditor, as long as the performance is not impossible, bound to claim performance, or is he, under some conditions, entitled to ask for compensation in money instead of specific performance?*

¹ Civil Code, § 279.

² *Ibid.*, §§ 280, 275, par. 2; 2 Planck, 81, and authorities cited.

³ Civil Code, § 281.

⁴ 2 Planck, 84-86, who does not, in opposition to the majority of the writers, consider the § 281 Civ. Code applicable to the last-mentioned illustration. As to the application of the stated rules to the so-called mutual contract, in other words, what happens to the purchase price if the delivery of the thing becomes impossible, or to the servant's wages if the master prevents him from rendering services, or to the claim of one partner if the other partner becomes unable to perform his duties, and the like see Civil Code, §§ 323-325.

Under the principle stated *sub* I, namely, that rights are to be exercised and enforced in complete accordance with their contents, the answer is that the creditor is bound to claim specific performance just as the debtor has the duty of specific performance. The change of the creditor's claim into compensation in money is therefore admitted only in exceptional cases. Two ways are given to the creditor for this purpose:

A. The creditor sues for performance. After he obtains a final judgment, he allots to the debtor a reasonable period for performance with a declaration that he refuses to accept performance after the expiration of the period. After the period has expired without performance, the creditor may demand pecuniary compensation.¹

B. The creditor puts the debtor who neglects to perform in due time in delay, giving him a warning after maturity of the obligation. No warning is necessary if a certain time is fixed for the performance.² The consequence of the debtor's delay is a claim of the creditor for compensation for the damages arising from the delay, besides the claim for specific performance, which remains unaffected.³ But

a. If the creditor has no further interest in the performance in consequence of the delay, he may, by refusing performance, demand pecuniary compensation.⁴ For instance, a surgeon is engaged for an urgent operation. All preparations are made, but the surgeon forgets to come and is out of town. Another surgeon may be employed and the extra expenses charged to the former surgeon.

b. If in the case of a mutual contract (contract of sale, exchange, for services, work, partnership, and others) one party is in delay in respect of the performance due from him, the other party may allot him a fixed reasonable period for performing his part with a declaration that he will decline the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for nonperformance. The fixing of a period is unnecessary if, in consequence of the default, the performance of the contract is of no use to the other party.⁵ For instance, a tailor promises to finish a suit next Sunday, but does not perform. I go Monday, to his shop, call his attention to the fact that he is in delay, and give him a reasonable period of

¹ Civil Code, § 283.

² *Ibid.*, §§ 284, 285.

³ *Ibid.*, § 286, par. 1.

⁴ *Ibid.*, § 286, par. 2.

⁵ *Ibid.*, § 326.

some days to deliver the suit, with the declaration,¹ that I shall decline to accept the suit after the expiration of the period. If the delivery is not effected, his duty to compensate me for damages caused by his delay arises.²

C. By the debtor's refusal to perform, the creditor does not, as a rule, obtain the right to choose compensation instead of performance. But by such refusal the fixing of the period mentioned above and to some extent also the warning by the creditor, required to put the debtor in delay, become unnecessary.³

THIRD: *Is any claim for specific performance given against third persons who have obtained the object of the performance?* The discussion of this so-called *jus ad rem* may here be limited to the question: If B has a claim against A for the delivery of a corporeal thing and later on the title in the thing or the possession passed from A to C, has B any claim directly against C?

The Roman law was based on the fundamental distinction between *jus in rem* and *jus in personam*, and therefore relative rights created a claim against third persons in very exceptional cases. For instance, by the *actio quod metus causa* (belonging to the class of *actiones in rem scriptae*) a person C, although innocent, was bound to restore goods to B which he had obtained by the threats of A against B and in which he had acquired the title.⁴ In the older German law the idea was more general, that a person B who enters into an agreement with A the purpose of which is the delivery of a corporeal thing from A to B, by such agreement acquires a *jus ad rem* against any third person. Distinctions were created merely by the question if such rule should apply to every third person or only to such third persons as were not *bona fide*.⁵ The latter principle was accepted by the French Civil Code in the provision that if a person has contracted to give the same movable to two different persons, the one who is put in actual possession is preferred and remains owner though his title thereto be later in

¹ This declaration is essential.

² 50 Reichsgericht, 255 (1902); 2 Planck, 150-161. As to the method in which the amount of damages is paid, cf. Kipp, *Schadensersatz wegen Nichterfüllung in Verhandlungen des 27. deutschen Juristentages*, vol. I, pp. 248 *et seq.* The person who ordered the suit may, of course, if he prefers, sue the tailor for specific performance and execute the judgment against him, if the tailor is a man of unusual ability, in accordance with the rule *sub* III, 4 b, otherwise according to the rule *sub* III, 4 a.

³ 2 Planck, 92, 93, 158, and cases and authorities cited.

⁴ 1 Windscheid-Kipp, § 45, note 6; 2 *ibid.*, § 462.

⁵ 2 Gierke, *Deutsches Privatrecht*, 608-611; 3 Dernburg, 195-197.

date, provided his possession is in good faith.¹ Furthermore, if a seller of a piece of land B had reserved his right of re-purchase and the buyer A sells and conveys the land to C, B can exercise his right of re-purchase directly against C, although C had no knowledge of the right of re-purchase.²

The Prussian Code contains the provision that a person who has a claim to an individual thing may sue any third person who, when obtaining the thing, was aware of the older right of another person to obtain the thing. Therefore, the same thing cannot be sold to different persons, if the later acquirer is aware of the previous contract.³ But when the system of land-registration was introduced in Prussia,⁴ this rule was not accepted and became therefore limited to rights in personal property.

The German Civil Code is based on the fundamental difference of *jus in rem* and *jus in personam* and has not admitted the *jus ad rem*. Nevertheless, many provisions lead to the result that contractual claims for the delivery of a thing may be directed against third persons who acquired the thing with knowledge of the former claim. Such provisions are as follows:

a. A person who wilfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.⁵ This rule has been given by the authorities the following interpretation: Where A sells a thing first to B, and thereupon with the intention⁶ to destroy B's right, to C, and transfers the title to C,⁷ who is aware of A's intention, B may sue C in damage, and the result of such suit would be an order for the reconveyance of the title to A.⁸ Or, where B has sold a thing to A and reserved to himself the right of repurchase, and A, after he has obtained the

¹ French Civil Code, Art. 1141; Crome, Allgemeiner Teil des französischen Privatrechts, 220-221.

² French Civil Code, Art. 1664 (limited to real property by Art. 2279); 2 Zachariae-Crome, Französisches Civilrecht, 502 *et seq.*; 1 *ibid.* 348.

³ 1 Prussian Code, 19, § 5, 10, § 25; 1 Dernburg, Preussisches Privatrecht, 2 ed., 410-415.

⁴ By statute of May 5, 1872.

⁵ Civil Code, § 826.

⁶ It is not sufficient that A should know the result of his act; he may, for instance, act under pecuniary embarrassment, hoping to acquire the thing back later.

⁷ The transfer of title in personal property is generally effected by transfer of the possession. Civil Code, §§ 929 *et seq.* As to real estate, registration is required, *cf.* the writer's article mentioned above, in 21 HARV. L. REV. 485-488.

⁸ Planck in the article cited in the next note (p. 173).

title from B, transfers the title to C, with the intention as above, and C knows the facts, B may sue C to the same effect.¹

b. Many ways are provided by the Code to make merely obligatory rights effective *in rem*. The following illustrations may be given:

aa. A has agreed to sell his house to B, but for some reason (for instance, because B is not yet able to pay the purchase price) the registration of B as owner and the declaration of the parties in the Land-Court, which is required for that purpose, is postponed. In such cases a caution (*Vormerkung*) in B's favor may be registered either with A's consent or by temporary injunction. B does not acquire any title in the land by the caution, but on the other hand A is unable to destroy B's expectancy by selling the land to C.²

bb. A has sold his horse to B, but wants to continue the use of the horse for some time. Parties may agree that the title shall pass to B³ immediately and that A shall keep the horse as B's bailee.⁴ If subsequently A sells the horse to C, who is aware of those facts, or does not know them in consequence of gross negligence, C does not acquire any title and may be sued by B for reconveyance of the horse.

cc. B has sold and delivered his book to A and reserved to himself the right of re-purchase within three months. If before this time A sells and delivers the book to C, who knows B's right of re-purchase, C nevertheless acquires title to the book.⁵ But if B and A, when making the contract, expressly provide⁶ that in case B exercises his right of re-purchase, the title shall immediately revert in B, A is unable to transfer the title to C, who is in bad faith, because the effect of such condition subsequent is *in rem* and effective against everybody to whom such condition is known or unknown in consequence of gross negligence.⁷

c. If A transfers the title in a thing which he is bound to deliver to B on account of unjust enrichment or of B's ownership, to C, an

¹ 62 Reichsgericht, 137; 2 (2) Dernburg, 99, 100; 3 *ibid.* 197; 2 Crome, 490; 2 Planck, 407. The Reichsgericht goes even beyond the rule stated above, and is in so far criticized by Planck in *Deutsche Juristenzeitung*, 1907, p. 10.

² Civil Code, §§ 883-885; 3 Dernburg, 156-164; 3 Crome, 174-191.

³ By the mere contract of sale no title passes. Civil Code, § 433.

⁴ The so-called *lex commissoria*. Civil Code, § 930.

⁵ He may under given conditions be sued under Civil Code, § 826; see above, *sub a*.

⁶ An express provision is necessary, as rights of re-purchase or rescission are by the Code treated as obligatory. Civil Code, §§ 499, 346; 54 Reichsgericht, 340 (1903); 1 Standinger, Kommentar z. B. G. B. 504.

⁷ Civil Code, §§ 158, 161, 932, par. 2.

innocent person, gratuitously, B has generally a direct claim for reconveyance.¹ The same rule applies if the thing came out of B's and into C's possession, *e. g.*, C has stolen or found the thing.²

2. *Injunctions.* Every claim the purpose of which is a forbearance of the debtor gives to the creditor the right of injunction if the debtor violates his duty. A claim for the forbearance of the debtor may be based on all kinds of rights. The main source for negative claims is the absolute rights, like ownership, inheritance rights, patents, copyrights, and others. Everybody who interferes with such rights creates, in favor of the creditor, a claim to enjoin him. Negative claims based on obligatory rights may either be created by express agreement, for instance, by a contract not to take part in certain transactions, *e. g.*, not to bid at a public auction, not to start a competitive business; or, such negative claims may be contained in contracts of a generally affirmative character, like the duty of a commercial employee not to enter into competition with his employer during his employment.³ Finally, torts which are of a continuous character, like unfair competition, entitle the injured party to a decree of injunction against the tort-feasor.

These kinds of injunction are based on negative claims and can therefore be obtained only after a right has been violated, or, at least, was due. The enforcement of such claims is not in principle different from the enforcement of claims for specific performance.

But, also, temporary or interlocutory injunctions of a mandatory or prohibitory nature may be obtained for the protection of rights which are merely threatened without actual violation. The cases in which temporary injunctions can be obtained are as follows:

a. "Temporary injunctions, concerning the object of litigation, may be issued, if there is any danger that by a change of the actual situation the enforcement of the right of one of the parties would be prevented or made subject to grave difficulties."⁴

b. "Temporary injunctions may be issued also in case of any litigation for the purpose of creating a temporary situation, if it is shown to be necessary to avoid material harm or to prevent violence threatened or to protect any other legal interests."⁵

Under these provisions a very large space is provided for the issuing of injunctions and the courts have made a liberal use of their powers. All kind of rights, absolute and relative rights,

¹ Civil Code, §§ 816, 822.

² Commercial Code, § 60.

³ *Ibid.*, § 940.

⁴ *Ibid.*, § 281.

⁵ Code Civ. Proc., § 935.

property and family rights, and the like have been protected by injunctions, and it was not required that a lawsuit should have been already begun, but the mere existence of an object of litigation in connection with any threatened change of it was considered to be a sufficient reason for an injunction.¹ In urgent cases injunctions may be obtained *ex parte*.²

There are, however, differences in the use of this remedy compared with this country. In Germany the function of the courts is limited to the decision of private rights, of claims between individuals based on the private law. Now many claims which have their source in the private law are connected with claims of a public character. The main illustration is given by the law of torts: many claims based on torts (injuries to life, body, health, ownership), create at the same time a criminal claim for the state's authorities (manslaughter, assault and battery, embezzlement). In such cases the individuals are not prevented from suing for damages which they have suffered. However, the courts would hardly give their assistance to prevent threatened violence by the way of civil injunctions, but would send the applicant to the police. Therefore in cases of criminal attempts to destroy property, for instance, by striking laborers, the police powers of the state would prevent injury from being done and no action for a civil injunction would, as a rule, lie.³

Furthermore, the courts, even where property rights are threatened, would not, by granting injunctions, touch questions of administrative law or political character. For this reason injunctions could not be obtained against state officials acting in an unconstitutional or otherwise illegal manner. In all these cases special remedies are provided by the administrative law of the different German states.⁴

Finally, those kinds of injunctions which are due to the dis-

¹ As to details and cases, cf. 2 Gaupp-Stein, 774 *et seq.*, 816 *et seq.*, 825 *et seq.*

² Code Civ. Proc., § 937, par. 2.

³ The following opinion is given by the Supreme Court of the United States: "There must be some interference actual or threatened with property or rights of pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law." *In re Debs*, 158 U. S. 564, 593. This opinion would probably not be followed by the German courts in general.

⁴ The remedies against illegal or unconstitutional acts of a state's officials are on principle the same as against decrees of courts, namely, appeals to the Superiors or to special administrative courts. But the state and city authorities could hardly be enjoined from doing an act.

inction between law and equity (for instance, against multiplicity of suits, undue influence, etc.) have, of course, no analogies in the German procedure, where no such distinction exists.

3. *Damages.* The main source of claims for damages is torts. This branch of the law has, however, lost much of its importance as a source of damages, since, by Imperial Statutes,¹ employers of all kinds (owners of factories, mines, carriers by railroad or boat, persons engaged in agriculture, forestry) are bound to compensate their employees for all kinds of accidents which happen in the course of their business. The employees lose their claim for compensation only if they are proved to have intentionally caused the accident.² The employers are, for the purpose of compensation, organized in *quasi*-public corporations (*Berufsgenossenschaften*), and claims arising from accidents are settled by administrative courts, composed of employers and employees.³

As regards contracts, the cases in which damages are primarily agreed upon are exceptional, as in contracts of insurance or guaranty. Usually a claim for damages arises only either instead of a claim for specific performance under the conditions shown *sub* 1, or besides claims the main purpose of which is specific performance or injunctions.⁴

Concerning the *reasons* for damages they are usually two, namely: first, any wilful or negligent act by which rights are violated, and, second, a causal relation between this act and the injury done. The latter point has been liberally interpreted by the courts.⁵ As to the former point, the Code provides that in many cases a person is liable for damages although no fault can be imputed to him. For instance, a person who keeps an animal is bound to make compensation in damages if by the animal a person is killed or his body or health is injured.⁶ Or persons who are by insanity or tender age unable to commit a tort are nevertheless bound to make a reasonable compensation to persons injured by

¹ Reënacted July 5, 1900.

² Cf. for instance *Gewerbe-Unfall-Versicherungs-Gesetz*, § 8.

³ *Schiedsgerichte*, appeal goes to the *Reichs-Versicherungs-Amt*.

⁴ For instance, in the case of delay (see II, 1, Second B) or in case of violation of absolute rights (injunctions against further violations and damages for the injuries already done).

⁵ 53 *Reichsgericht*, 114 (1902): The noise made by an elevated train in Berlin frightened a horse which was on the street; the horse ran away and killed a person. The railroad was considered to be liable in damages.

⁶ Civil Code, § 833.

them.¹ Or a person who has obtained a temporary injunction which later proves to be unjustified, is liable to compensate the injured party for damages even where no fault may be imputed to him.² Railroads are liable in damages unless they prove that the accident was caused by *vis major* or by negligence of the person killed or injured.³

If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depend upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.⁴ For instance, a man sends a messenger with a box to another person and conceals the fact that the box contains jewels; the messenger negligently loses the box; he is not bound to make full compensation. Or a man allows his neighbor's horse to injure his property although he could easily prevent it; full damages cannot be obtained.

As regards the *method of fixing* damages, it corresponds to the principle, stated above, that the purpose of the enforcement of claims is the creation of a condition which is in accordance with the right. The rule, therefore, is that a claim by way of damages has not the purpose of securing money damages but restitution in specie. The Civil Code says:

"A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred."⁵

Therefore, if somebody has intentionally killed my horse which was of an average kind, or negligently loses my book, I sue him for specific reparation, which means an equivalent horse or book. Likewise, if somebody has broken my window, he has to provide for the reparation; if my neighbor's dog has torn my clothes, I send them to his tailor.⁶

However, there are exceptions to this principle of restitution in kind, most of them given in favor of the creditor and not of the debtor.⁷

a. If compensation is required to be made for injury to a person, or damage to a thing, the creditor may demand, instead of restitution in kind, a sum of money necessary to effect such restitution.

¹ Civil Code, § 829.

² Code Civ. Proc., § 945.

³ Liability Act of June 7, 1871.

⁴ Civil Code, § 254.

⁵ *Ibid.*, § 249, par. 1.

⁶ 2 Crome, 66; 2 Kohler Bürgerliches Recht, 125; 2 (1) Dernburg, 78.

⁷ Civil Code, §§ 249-251.

b. The creditor may fix a reasonable period for the restitution in kind by the person liable to compensate, with a declaration that he will refuse to accept restitution after the expiration of said period. After the expiration the creditor may demand compensation in money if the restitution is not effected in due time.

c. In so far as restitution in kind is impossible or insufficient to compensate the creditor, the person liable shall compensate him in money.

d. The person liable may compensate the creditor in money if restitution in kind is possible only through a disproportionate outlay.

It is apparent from what has been said that, although compensation in damages primarily means restitution in kind, neither the creditor nor the debtor is so strictly bound to choose this method as to choose specific performance in cases where it is possible, but can more easily substitute the method of compensation in money.

In the *amount* of damages, also, lost profits are included. Profits are deemed to have been lost which could have been expected with probability according to the ordinary course of things or according to the particular circumstances, *e. g.*, according to the preparations and provisions made.¹ Therefore a person who is entitled to full damages (including lost profits) is not bound to prove that he actually suffered a loss of profits, but it is sufficient for him to show that in all probability he could expect those profits.² For instance, a merchant buys goods to be delivered at a later day, the delivery agreed upon is not effected, in the meantime the market value of the goods increases, the merchant therefore was very likely to sell them at this higher price, he is entitled to claim the increase in the market value as lost profits, even if he could not expect it.³

The amount of damages is extended in case of many torts. For instance, in case of causing death to a person who at the time of the injury had to furnish maintenance to a third party (wife and children) who are in consequence of the death deprived of such maintenance, the injuring party has to furnish the full maintenance during the presumable duration of the life of the person killed.⁴

For an injury which is not an injury to property, compensation in money may be demanded only in the cases specified by law,

¹ Civil Code, § 252.

² 2 Planck, *ibid.*

³ 2 Planck, 28-31 and authorities cited.

⁴ Civil Code, §§ 844, 845.

for instance in the case of seduction or for any injury done to the body or health of another.¹

Finally, in exceptional cases, instead of full damages only actual outlay may be demanded (*negatives Vertragsinteresse*).²

III. EXECUTION OF JUDGMENTS.

The enforcement of the claims by way of specific performance, injunction, restitution in kind, and damages, has the ultimate purpose of establishing a condition which is in accordance with a right. Execution of a judgment is the last step in accomplishing this purpose. In accordance herewith judgments may be executed in any of the following ways:

1. Defendant is condemned to pay money to the plaintiff.³

a. The *choses* in his possession, in so far as they are necessary for the satisfaction of the claim, are attached and after a reasonable time sold by public auction and the money is paid to the creditor up to the amount due.

b. *Choses in action* and any property of the debtor which is in the hands of third persons are attached by judicial order, forbidding the debtor and the garnishee to dispose of any of these things. If the garnishee admits the existence of his obligation to the debtor, he may deliver the thing to the sheriff, who disposes of it in the same way as in the case of direct attachment; but if the garnishee denies the right of the debtor, then the creditor has to sue him, taking the place of a legal assignee of the debtor.

c. Execution in real property is effected by registration of a lien, by sequestration, or by public auction under judicial supervision.

2. Defendant is condemned to deliver a corporeal thing to the creditor.

a. If the thing is a movable thing, the sheriff takes it out of the possession of the debtor and hands it over to the creditor. If the thing cannot be found, the creditor may have the debtor swear an oath that he has not the thing, neither does he know where it is. If the debtor swears the oath, the creditor of course can only sue him for pecuniary damages. If the debtor refuses

¹ Civil Code, §§ 253, 847.

² For instance, in the case mentioned *sub* 1, First A *c.*, *cf.* further Civil Code, §§ 122, 179.

³ Code Civ. Proc., §§ 803-882.

to swear, or does not appear in court, he is fined for contempt of court and confined in jail up to six months.¹

b. If the thing is a movable thing in the possession of a third party, the rules under 1, *b* apply.²

c. If the thing to be delivered by the debtor is an immovable thing or a ship, the sheriff puts the debtor out of possession and gives possession to the creditor.³

3. Defendant is condemned to make a declaration, for instance, to declare his consent as to a registration of the plaintiff as owner of a piece of land in the land register; or, to declare his consent that a given amount deposited in his favor may be paid out to the plaintiff. In such case, by the mere fact that the judgment has become final the declaration is deemed to be given, and no act on the part of the debtor is necessary. The creditor may use such judgment with the same effect as if the debtor had made a declaration; for instance, he may become registered landowner of land belonging to the debtor.⁴

4. Defendant is condemned to perform an act other than of the kind described above.

a. In case this act can be performed by another person as well, the creditor on his application has to be authorized by the court to appoint another person instead of the debtor and at the debtor's expense. A decree fixing the amount of such expenses against the debtor may be obtained at the same time.⁵ For instance, the debtor is condemned to render services or to make building constructions or to perform any transactions (like purchases of bonds, chattels) which require average skill. In all such cases the creditor may obtain the permission to appoint another person in place of the debtor to perform his obligation.

b. Defendant is condemned to perform an act which can be done by him alone.⁶ For instance, he has to sign a bill of exchange, he has to give an account, he has to assist in the institution of legal proceedings. If he refuses to do it, he may be fined up to fifteen hundred marks or confined up to six months.

There are, however, some exceptions to the last rule, namely:

aa. If a spouse who has left the household is condemned to return, and in similar cases, no execution is given on such decree, but the decree may be used by the successful party only for the foundation of a divorce suit.

¹ Code Civ. Proc., §§ 883, 884, 899-915.

² *Ibid.*, § 886.

³ *Ibid.*, § 885.

⁴ *Ibid.*, § 894.

⁵ *Ibid.*, § 887.

⁶ *Ibid.*, § 888.

bb. By suggestion of the House of Representatives (*Reichstag*), since 1900 the rendering of services has become excepted from the above rule. Now the condemnation of a person to render services which can be done by another person in the same way may be executed in accordance with rule 4, *a.* On the other hand, the courts always have decided that services which require special and individual ability, as in art or science, are no fitting subject of execution at all. Therefore, prominent singers have never been forced by fines or jail sentence to sing, nor have celebrated painters been forced to paint a picture agreed upon, nor authorities in science to write treatises on their special subjects.¹ Therefore this amendment has no great importance.

5. Defendant is condemned to forbear action or to suffer an act of the creditor.² If he violates this obligation, he may be fined up to fifteen hundred marks, or confined up to six months, for each violation, with an aggregate maximum of two years.

In all the cases under 2 to 5 the creditor's right to ask for pecuniary damages remains unaffected.³

In case of temporary injunctions the court may order any measure which it considers as convenient for the enforcement of its order.⁴

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¹ 2 Gaupp-Stein, 736, 739. A condemnation could be obtained in all such cases (see above), and such judgment may become useful as title for damages and for other purposes. Cf. 1 Gaupp-Stein, 550.

² Code Civ. Proc., § 890.

³ *Ibid.*, § 893.

⁴ *Ibid.*, § 938.

STARE DECISIS AND CONTRACTUAL RIGHTS.

IN *Muhlker v. New York & Harlem R. R. Co.*¹ the Supreme Court of the United States held that the raising, pursuant to a state statute so directing, of a railroad structure in Park Avenue, New York City, which formerly was on, or partially below, the level of the street, to an elevated viaduct, whereby the easements of light and air of abutting owners were substantially curtailed, deprived owners who had purchased since the decisions of the New York Court of Appeals in the elevated railroad cases² of contractual rights in contravention of the Constitution of the United States.

The decisions in the New York elevated railroad cases are so generally familiar that it will not be necessary to do more than briefly state their substance. In *Story v. New York Elevated R. R. Co.*³ it was held that the erection and operation of an elevated railroad structure in a public street did not involve a legitimate street use, but constituted an actionable invasion of easements of light, air, and access of abutting owners. In *Lahr v. Metropolitan Elevated R. R. Co.*⁴ the doctrine of the Story case was reiterated, the decision being particularly significant because two of the judges who had dissented in the Story case concurred on the ground of *stare decisis*. When the question of the Park Avenue viaduct came before the Court of Appeals in *Lewis v. New York & Harlem R. R. Co.*,⁵ it was taken for granted that the building of a structure higher above the street level than a previous structure which had been used by the railroad wrought an additional invasion of easements of light and air, and that the principles of the Story and Lahr cases must control, entitled abutting owners to damages.

In the Muhlker case,⁶ however, the court took just the contrary view, attempting a distinction on the ground that the railroad viaduct amounted merely to a change of grade of the street, which

¹ 197 U. S. 544.

² *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268.

³ *Supra*.

⁵ 162 N. Y. 202.

⁴ *Supra*.

⁶ 173 N. Y. 549.

might be made without compensation to private landholders. This distinction was based upon the earlier New York case of *Radcliffe's Executors v. Brooklyn*,¹ and it may be remarked, in passing, that in his dissenting opinion in *Fries v. New York & Harlem R. R. Co.*² Judge Cullen not only showed that the doctrine of *Radcliffe's Executors v. Brooklyn* had been repudiated in many jurisdictions and that the hardship of its application had been salved in several instances in New York by legislative enactments, but also demonstrated that the effort to justify the Park Avenue viaduct involved an unwarrantable extension even of that very extreme case.

The *Muhlker* case, while thus presenting to the Supreme Court of the United States about as meritorious a situation as could be imagined, did not afford the first recognition by that tribunal of contractual or vested rights in the observance of the doctrine *stare decisis*. It does, however, extend such recognition into a new field.

In *Gelpcke v. Dubuque*³ it was held that decisions of the Supreme Court of Iowa, interpreting the constitution and statutes of that state, afforded legal rules to govern transactions which occurred before such decisions were overruled by a later decision of the state Supreme Court. From the decision in the *Gelpcke* case Justice Samuel F. Miller dissented, characterizing it as a step "in the direction of a usurpation of the right, which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes." The opinion of the court dwelt principally upon the obvious injustice of permitting judicial "oscillations" to disturb contractual relations entered into upon the faith of deliberate decisions.

The *Gelpcke* case is harmonious in principle with *Harris v. Jex* in the New York Court of Appeals,⁴ in which it appeared that a grantee of premises subject to certain mortgages executed prior to the Legal Tender Act, after the decision of the Supreme Court of the United States,⁵ holding said act void as to antecedent contracts, and before the reversal of that decision,⁶ tendered payment of the mortgages in legal tender notes, which was refused. In an action to foreclose the mortgages it was held that the mortgagee was entitled to repose upon the decision of the highest judicial

¹ 4 N. Y. 195.

² 169 N. Y. 285.

³ 1 Wall. (U. S.) 175.

⁴ 55 N. Y. 421.

⁵ *Hepburn v. Griswold*, 8 Wall. (U. S.) 603.

⁶ *Knox v. Lee*, 12 Wall. (U. S.) 457.

tribunal in the land, which was, as applied to the relations between the parties, *the law* and not mere evidence of it; and that the tender, being insufficient according to the law as then declared, did not discharge the lien of the mortgages.

The purport of the decisions in the Gelpcke case and in *Harris v. Jex* is that, in dealing with a question that in a sense is one of foreign law, that is, the construction of an enactment of an outside legislative body by its own highest judicial interpreter, a construction that has been given will be treated as a reliable basis for business dealings until the same court renders a different one. The Gelpcke case originated in a federal court, and the principle it laid down did not go further than protection of contractual rights of persons entitled to resort to federal courts in the first instance.

It is of interest to note that in the Muhlker case the law which was held to be the contractual basis—that is to say, the law of the elevated railroad cases—was pronounced by courts and not by statute. The decision would therefore seem to be an authoritative repudiation of the Blackstonian theory¹ that a decision is only a more or less successful attempt to discover and state what the law is. The Supreme Court countenanced the doctrine of Austin² by holding that a decision of a court is the law itself, and therefore, it is argued, a continuing rule of conduct upon whose applicability trust may be placed until fair notice is given that not it, but another rule, shall prevail in the future.³ The Story and Lahr de-

¹ 1 Bl. Com. *70.

² Austin, Jurisp., § 778.

³ The most satisfactory exposition of the process of common law evolution with which the writer is familiar is the following by Sir Henry Maine: "We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact, they have changed. A clear addition has been

cisions by the New York Court of Appeals of purely common law questions were treated as *the law*, in the same manner that in *Harris v. Jex* the New York Court of Appeals accepted the earlier construction of the Legal Tender Act as *the law*.

The Muhlker case did not originate in a federal court, and its decision by the Supreme Court of the United States goes further than any previous authority, because it is held that an attempted change in *the law* by a state court in a suit between its own citizens raises a question under the Constitution of the United States, which may be taken advantage of on appeal from the highest court of the state. The actual decision in the Muhlker case, in like manner with that in the Gelpcke case, is a substantial aid to stability of contractual obligations and to justice. It would be exceedingly difficult, however, to answer the theoretical argument of Justice Holmes, with whom three of his associates concur in dissent. The gist of his reasoning is that the federal court is bound by local decisions as to local rights in real estate, and equally bound by the distinctions and limitations of those rights declared by the local courts. As general propositions, these statements are, of course, true; but the majority of the court recognize a vested right in the maintenance of a former decision if the highest federal court, itself determining the existence and extent of the contract, holds that an attempted distinction is not legitimate or substantial.

The kernel of the decision is contained in the following language from the prevailing opinion:

"And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power of the courts of New York, to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pro-

made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring." *Maine, Ancient Law*, c. 2.

nounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate."

In view of the fact that the abutting property owners relied both upon the contract clause of the federal Constitution¹ and the due process of law clause of the Fourteenth Amendment, it is regrettable that the opinion of the court is not clearer and more specific. The discussion in the dissenting opinion is principally directed to the operation of the contract clause, a reference, however, also being made to the Fourteenth Amendment. The present decision may be rested upon the contract clause alone, because what the Supreme Court determines to be the contract right was impaired by action pursuant to a state statute. The following dictum of Chief Justice Taney in *Ohio Life & Trust Co. v. Debolt*² was quoted with approval in the opinion of the court in *Gelpcke v. Dubuque*:

"The sound and true rule is, that if the contract when made was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts* altering the construction of the law."³

This, however, does not represent the law as it has been established by later cases. In *Weber v. Rogan*,⁴ and authorities therein cited, it is laid down that, in order for the contract clause to apply, the alleged impairment of contract must be by a state statute and not merely by judicial decisions or acts of the state tribunals or officers. The necessary scope of the decision in the *Muhlker* case is therefore somewhat limited.

Nevertheless, the general attitude of the court is significant of the position that probably would be taken if a case should arise in which a state court, not in effectuating a statute but upon a purely common law basis, should incontinently overrule itself with the result that parties who in their business dealings had relied upon the earlier decision suffered substantial loss. If a state court upon some question involving title to real estate should thus be guilty of palpable tergiversation, the inference is fair that a person aggrieved

¹ Art. I, § 10.

³ The italics are ours.

² 16 How. (U. S.) 432.

⁴ 188 U. S. 10.

might be granted a remedy on appeal to the Supreme Court of the United States under the Fourteenth Amendment. Presumptive authority for this position is furnished by *Chicago, B. & Q. R. R. Co. v. Chicago*,¹ wherein Mr. Justice Harlan elaborately examines the question whether the requirement of due process of law is confined to the providing of notice of, and opportunity for, hearing before a person's property is taken. The court cites, apparently with approval, the very sweeping language on the subject of Mr. Justice Jackson, while a Circuit Court judge, in *Scott v. Toledo*,² and holds that the guarantee of due process of law requires compensation to be made or secured to the owner of private property taken for public use, and further that the prohibitions of the Fourteenth Amendment comprehend all the instrumentalities of the state; — its legislative, executive, and judicial authorities. The dissenting opinion of Mr. Justice Brewer does not contravene, but strongly upholds, these abstract positions of the majority.

In *Scott v. McNeal*³ it was directly held that the prohibitions of the Fourteenth Amendment extend to judicial acts, and, accordingly, that the judgment of the highest court of a state validating the title of a purchaser of land sold under an order of a probate court, belonging to a living person who had not been notified of the proceedings, deprived the latter of his property without due process of law.

The Gelpcke and Muhlker cases are sufficient authority for the general proposition that a judicial decision relied upon by an investor is such a contractual element as would constitute a property right. If it violate the guarantee of due process of law to take private property for a public use without compensation, *a fortiori* it would do so to take it for private use or enrichment. Indeed, there is no valid process of law by which private property may compulsorily be acquired for private use.⁴

On the whole, there appears to be adequate theoretical justification for upholding the obligation of *stare decisis* under the federal Constitution in almost any case where a citizen has reposed trust in a court's formulation of the law and pecuniary loss would result from judicial instability. Let us assume that a state court of last resort had decided that a certain strip of land is privately owned

¹ 166 U. S. 226.

² 36 Fed. 385.

³ 154 U. S. 34.

⁴ See *Davidson v. New Orleans*, 96 U. S. 97-102; *Missouri Pac. Ry. Co. v. Nebraska*, 164 U. S. 403; *Chicago, etc., R. R. Co. v. Chicago*, 166 U. S. 226-236.

and that a person then purchased the same, or a portion of it, being either the part which the adjudication actually concerned or another part in precisely similar category on the facts. Assume, also, that in a suit thereafter brought by or against such purchaser the same court should retract its former utterance and hold that the land had before the commencement of the first action been finally dedicated and legally accepted, so that it had not been the subject of private ownership.

Let us fancy a row of identical buildings, erected by a common owner of the lots and by him conveyed, by deeds identical in form, to different persons. Let us further suppose that the highest court of the state had held that there was appurtenant to one of these houses a certain beneficial easement in the premises next door; that, subsequent to such decision and relying upon it, a person purchased another of the buildings and in legal proceedings by him to effectuate or protect his precisely similar easement the court of last resort overruled its former decision and held that no servitude existed.

A federal question would not arise in either of these moot cases under the contract clause, because contractual rights had not been impaired by a state statute. The way would, however, seem open for the Supreme Court of the United States to reverse the later decision of the state court on the ground that through its operation private property had been taken or extinguished without compensation, and therefore without due process of law.

There is a paradoxical, semi-humorous suggestion in the circumstance that in the Gelpcke and Muhlker cases the Supreme Court of the United States, in order to relieve against disregard of the obligation of *stare decisis*, itself, if not overruling specific decisions, at least went counter to what eminent dissenting judges regarded as legal first principles. The opinion of the majority of the court in the Gelpcke case is little more than an elaboration of the adage that the law was made for the people and not the people for the law. The same consideration of safeguarding rights that the ordinary citizen ought to be permitted to regard as vested rights, is the dominant note in the prevailing opinion in the Muhlker case.

The real key to these decisions lies in the fact Mr. Bryce lucidly expounds, taking *Munn v. Illinois*,¹ as his principal illustration, that "the Supreme Court feels the touch of public opinion."² In his

¹ 94 U. S. 113.

² 1 Bryce, *American Commonwealth*, 267.

work, "The Government of England,"¹ Mr. A. Lawrence Lowell states that the reason why the spoils system never obtained foothold in England was the prevalence of the "sentiment that a man has a vested interest in the office he holds." While this absurdly exaggerated conception never has been entertained here, American public opinion does demand, along with police protection of the peace, civil protection of vested rights asserted under private contract. The masses of the people are firmly persuaded that bad laws that are certain are better than good laws that are changeable. Continuity and consistency of judicial exposition are indispensable for faith to embark in enterprises extending into the future. Such decisions as that by the Supreme Court of Iowa disregarded in the Gelpcke case and that by the New York Court of Appeals in the Muhlker case would introduce an element of South American insecurity into commercial life. General relaxation of the obligation of *stare decisis* would foster commercial anarchy.

Expressions quite frequently occur in opinions of American courts that indicate a proper sense of responsibility as law-givers transcending in importance the immediate duty of arbitrators. It is not at all uncommon for a court expressly to say that it will not overrule a decision that has supplied a rule of property, though another doctrine is deemed abstractly better. The most serious menace to the reliability of the law has arisen, not through frank and avowed changes of mind, but through casuistical evasion of precedent, through resort to distinctions that do not distinguish. This tendency to preserve an appearance of consistency while laying down an inherently discordant principle has been on the increase in most of the state courts. No better example of it could be furnished than the decision in the Muhlker case by the New York Court of Appeals. The reversal of that decision by the Supreme Court of the United States has rendered an important service in promoting business confidence and justice. By the recognition of the right to appeal to the Supreme Court of the United States the moral obligation of *stare decisis*, which state judges always admit, practically becomes a legal obligation.

Wilbur Larremore.

NEW YORK.

¹ Vol. I, p. 154.

RUNNING WATER.

WATER running in a natural stream unrestrained is the property of no one, but a portion of it taken out of the stream and confined in the possession of an individual becomes the taker's private property, and belongs to him while under his possession and control. The law of running water (watercourses) is a development of the rules under which one may take into his own possession and make his private property a portion of the flowing mass which in its natural course and wandering is uncontrolled by man and belongs to no one. There is a large body of law specifying *who* may make this transition and to what limitations they are subject, forming, in the common law, "the law of riparian rights," and in the West, "the law of appropriation." It is our object here, by presentation of authorities, to show that this transition forms the framework of the law of watercourses, but not at all to enter into the rules of "riparian rights" or "appropriation" that have been built around it.

I. THE CORPUS OF RUNNING WATER.

In the Institutes of Justinian it is declared concerning things: "They are the property of some one or no one."¹ As further expressed in the Institutes, "By natural law all these things are common, viz: air, *running water*, the sea and as a consequence the shores of the sea."² Commenting on this, Vinnius says: "Things common are such because, while by nature being things every one has use for, they have not, as yet, come into the ownership or control of any one."³ That is, they are the property of no one, within the first quotation from the Institutes.

This classification of running water with what has been called "the negative community," such as the air, runs through the civil

¹ "*Vel in nostro patrimonio vel extra nostrum patrimonium.*" As translated in *Lux v. Haggin*, 69 Cal. 315, 10 Pac. 674.

² "*Et quidem naturali jure, communia sunt omnia haec; aer et aqua profluens, et mare, et per hoc, littora maris.*" 2 Justinian, Inst., tit. 1, § 1. Mr. Ware (Ware, Roman Water Law) gives chiefly the Pandects, and does not give this passage from the Institutes.

³ "*Communia sunt quae a natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt.*" Quoted in *Mason v. Hill*, 5 B. & Ad. 1.

law authorities. Vattel says: "There are things which in their own nature cannot be possessed. There are others of which nobody claims the property, and which remain common, as in their primitive state when a nation takes possession of a country; the Roman lawyers called these things *res communes*, things common: such were, with them, the air, the *running water*, the sea, the fish and wild beasts."¹ Puffendorff says: "'T is usual to attribute an exemption from the property to the light and heat of the sun, to the air, to the *running water*, and the like."² Grotius³ classes *aqua profluens* with *res communes*. A modern French work says: "The things which, suited alike to the use of all men, are not susceptible of exclusive possession cannot, on this account, form the object of a right of property. These things, which the Roman law called *res omnium communes*, are the air, the deep sea, and *running water* as such; that is to say, in the sense that one sees it in its state of continual motion and ceaseless change."⁴ Likewise the Spanish law, regarding which Esriche says that waters of fountains and springs as they go out from thence "become *running water*, *aqua profluens*, and pertain like common things (*cocas communes*)" etc.⁵ In an early English case the civil law authorities are stated as follows: "By the Roman law, *running water*, light, and air were considered as some of those things which had the name of *res communes*, and which were defined 'things the property of which belong to no person,' etc."⁶ In a leading English case where the civil law authorities are set forth and examined, the following is given as the Roman law: "No one had any property in the water itself except in that particular portion which he might have abstracted from the stream and of which he had the possession; and during the time of such possession only."⁷ The result of these authorities is that the *corpus* of naturally *running water* was classed in the Institutes and civil law writers with the air, and those

¹ 1 Law of Nations, c. 20; Chitty's translation, 109, § 234.

² 4 Puffendorff, c. 5, § 2; and see 3 *ibid.*, c. 3, §§ 3, 4.

³ Bk. C. 2, § 12.

⁴ "Les choses qui, destinées à l'usage commun de tous les hommes, ne sont pas susceptibles de possession exclusive, ne peuvent, par cela même, former l'objet du droit de propriété. Ces choses, que le droit Roman appelait *res omnium communes*, sont l'air, la haut mer, et l'eau courante comme elle; c'est-à-dire en tant qu'on l'envisage dans son état de mobilité continue, et de renouvellement incessant." 2 Aubry et Rau, Droit Civile Français, 4 ed., 34.

⁵ Esriche, *Aguas*.

⁶ *Liggins v. Inge*, 7 Bing. 692.

⁷ *Mason v. Hill*, 5 B & Ad. 1.

things which cannot be owned while in their natural state and condition, or as they have been called, the "negative community."¹

There is some variation from this. One variation is in changing *res communes* to *res publicae*. Domat² names as *res communes*, the heavens, stars, light, air, sea; as *res publicae*, the rivers, streams, their banks, highways. This variation is again below referred to. Another variation is in changing *aqua profluens* to rain water. One writer,³ commenting on the Institutes, reads *aqua pluvialis* for *profluens*, as among *res communes*, and classes *flumina* with *res publicae*. In another work, *cocas communes* are defined as those "*qui sirven a los hombres y demas vivientes como el aire, el agua llovediza* (rain water), *el mar y sus riberas*."⁴ It is evident that these are corruptions of the Institutes. In addition to the passage above, classing *aqua profluens* with the *res communes*, there is a different passage in the Institutes saying, "*Flumina autem omnia et portus publica sunt*," which has evidently induced some commentators to drop *aqua profluens* out of the *res communes*. Suffice it that the Institutes, with regard to air, running water, wild animals, and the negative community in general, make no distinction between *res communes*, *res publicae*, and *res nullius*: the distinction, when it is made, is the refinement of a few of the later commentators.

This civil law principle, that running water is in the negative community, passed into the common law. As regards a related branch of the law of waters, the law of accretion, it has been expressly said: "Our law may be traced back through Blackstone,⁵ Hale,⁶ Britton,⁷ Fleta,⁸ and Bracton⁹ to the Institutes of Justinian,¹⁰ from which Bracton evidently took his exposition of the subject."¹¹ The passage in the Institutes above quoted, classing running water as a substance, with the air, is transcribed by Bracton as the law of England, saying, "*Naturali vero jure communia sunt haec, . . . aqua profluens, aer, et mare, et littora maris, quasi maris accessoria*."¹²

Fleta says: "*Aliae communes sunt, ut aer, mare, et littora*

¹ Ohio Oil Co. v. Indiana, 177 U. S. 190; 20 Sup. Ct. Rep. 576; 44 L. ed. 729.

² Liv. prelim. tit. 3, s. 1, p. 16.

³ 2 Nicasius, tit. 1, 89 b.

⁴ Febrero Novissimo, T. 1, lib. 2, tit. 1; Lux v. Haggin, 69 Cal. 316; 10 Pac. 674.

⁵ 2 Com., c. 16, pp. 261, 262.

⁶ De Jure Maris, cc. 1, 6.

⁷ II, c. 2.

⁸ III, c. 2, § 6 et seq.

⁹ II, c. 2.

¹⁰ II, 1, 20.

¹¹ Lindley, L. J., in Foster v. Wright, 4 C. P. D. 438.

¹² Bracton, II, f. 7, pl. 5.

maris; aliae publicae, ut jus piscandi, et applicandi fulmina et portus."¹ Lord Denman, in *Mason v. Hill*,² says: "It is worthy of remark that Fleta, enumerating the *res communes*, omits '*aqua profluens*.'" The same may be said of Britton³ declaring, "Some things are common, as the sea, the air, and the seashore, and as the right of fishing in tidal waters and in the sea and in common waters and rivers"; though in a later section⁴ he includes wild animals among the things common, and he also classes rivers, like Fleta, as among things public instead of common. Perhaps some light upon this omission of *aqua profluens* from things common in Fleta and Britton is thrown by Professor Maitland's commentary upon Bracton in the publications of the Selden Society. According to Professor Maitland, Bracton is substantially a mere copy of the work of an Italian commentator upon the Institutes of Justinian, —a jurist of Bologna, named Azo, of great reputation in Bracton's time. In commenting upon the Institutes regarding *res communes*, Azo questions (but merely by way of query) whether there may not be a distinction between things common and things public, though the Institutes do not so distinguish. Bracton proceeded to adopt the distinction in general terms, not, however, applying it to *aqua profluens*, which he leaves as in the Institutes. It may be, then, that Fleta and Britton are influenced by Bracton and carry the distinction into actual application, and having put *flumina* into *res publicae*, feel a necessity then to omit *aqua profluens* from *res communes*. It is the same corruption as that above noted in some of the civil law writers.

The classification of running water with the air is, however, again taken up by another of the older writers, frequently referred to in the English reports.⁵ He finds the civil law rule in conflict with the maxim, "*cujus est solum, ejus est usque ad caelum*." Callis says: "It may here, as I take it, be moved for an apt question, in whom the property of running waters was."⁶ In my conceit, the civil law makes prettier and neater distinctions of those than our common law doth; for there it is said that '*naturali ratione quaedam sunt communia, ut aer, aqua profluens, mare, et littora maris*.'

¹ Fleta, lib. 3, cap. 1, § 4.

² 5 B. & Ad. 1.

³ II, c. 2, § 1; Nicholas' translation, p. 175.

⁴ § 3.

⁵ Callis, Sewers, original ed., 78, quoted in Medway, etc., Co. v. Romney, 9 C. B. n. s. 587. "Sewer" anciently signified small streams and brooks of fresh water.

⁶ Citing Natura Breva, f. 123; and Pl. Com. 154; and Y. B. 12 Hen. VII, f. 4, as recognizing a plaintiff as having property in the water as well as the soil.

I concur in opinion with them, that the air is common to all; and I hold my former definitions touching the properties of the sea and the seashores. But that there should be a property fixed in running waters, I cannot be drawn to that opinion; for the civil law saith further, '*quod aqua profluens non manet in certo loco, sed procul fuit extra ditionem ejus quod flumen est ut ad mare tandem perveniat*'; for in my opinion, it should be strange the law of property should be fixed upon such uncertainties as to be altered into *meum, tuum, suum*, before these words can be spoken, and to be changed in every twinkling of an eye, and to be more uncertain in the proprietor than a chameleon of his colours." This is the first express recognition the writer has discovered, of the conflict between this principle and the maxim "*cujus est solum*."¹

The writer has not, with the facilities at his disposal, been able to learn the date of Callis's book, but believes that it is older than what is, perhaps, the next authority in chronological order, the case of *Shury v. Piggott* (1625).² In this case (among many things said) *aqua profluens* was compared to the air, which "*aut invenit, aut facit viam*," and it was also said, "The same (the watercourse) being a thing which arises out of the land, *but no interest at all by this claimed in the land*, but *quod currere solebat* in this way, and so to have continuance of this."³

¹ Lord Coke says: "Land in legal signification comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furses and heath," discussing the meaning of "land," adding in the same note: "Also the waters that yield fish for the food and sustenance of man are not by that name demandable in a *praecipe*; but the land whereupon the water floweth or standeth is demandable, as, for example, *viginti acras terrae aqua coöpertas*. And lastly the earth hath in law a great extent upwards, not only of water, as hath been said, but of *aere* and all other things even up to heaven; for *cujus est solum ejus est usque ad caelum*, as is holden in 14 Hen. 8, fo. 12; 22 Hen. 6, 59; 10 Edw. 4, 14." Co. Litt., lib. cap. 1, §§ 1, 4a. See 2 Bl. Com. 18. That the law, while applying this maxim to percolating water, does not follow it as to running water, will appear further as our discussion proceeds. We take this occasion, however, to refer especially to *Lyon v. Fishmongers Company*, 1 App. Cas. 673; *Lord v. Commissioners*, 12 Moore P. C. 473; *North Shore Ry. v. Pion*, 14 App. Cas. 612, 621; *White v. White*, [1906] A. C. 83; Justice Story in *Slack v. Walcott*, 3 Mas. (U. S.) 508; Fed. Cas. No. 12932; *Webb v. Portland Cement Co.*, 3 Sumn. (U. S.) 189; Fed. Cas. No. 17322; Haupt's Appeal, 125 Pa. St. 211, 17 Atl. 436; 3 L. R. A. 536; *Moulton v. Newburyport, etc., Co.*, 137 Mass. 163; *Bigham v. Port Arthur, etc., Co.*, 91 S. W. 848 (Tex., Civ. App.); *City of Paterson v. East Jersey W. Co.*, 70 Atl. 472 (N. J. Eq.); *Lux v. Haggin*, 69 Cal. 255, 413, 10 Pac. 674; *Heilbron v. Fowler, etc., Co.*, 75 Cal. 426; 7 Am. St. 183, 17 Pac. 535; *Goodwin, Real Property*, 2; 19 HARV. L. REV. 216, n.; and the authorities herein below cited. The writer has given some degree of attention to the point in *Water Rights in the Western States*, 2 ed., Part II, Ch. II.

² 3 Bulst. 339.

³ Jones, J., in *Shury v. Piggott*, 3 Bulst. 340.

The case seems to have excited a good deal of attention at the time, being given in six different reports¹ and has been said to have discussed collaterally many things which were not necessary to the decision.² Lord Blackburn declares the stream in question appears to have been in reality an artificial one; though the maxim "*aqua currit et debet currere ut currere solebat*," as a rule of natural streams, probably rests upon this case. If, however, Lord Blackburn is correct in saying it was an artificial stream, it shows that this maxim really arose as a statement that the right to running water rests on prescription; and there is enough in the reports of other cases to show that such is the real origin of the maxim. We take this occasion to digress here and call attention to this.

The case discussed the matter from the view of formal pleading, as cases were usually treated at that time. The plaintiff declared, in the words of pleading on ancient custom, that the water "*currere solebat et consuevit*" to his land, and one of the judges rested his decision on the ground that, as he said, "*consuevit* is a good word for a custom." That the words of the maxim arose from this idea of resting the right to watercourses upon prescription or custom from time out of mind, appears in numerous other of the older authorities succeeding this case. In one it was held, "By reason of the words *consuevit et debuit* it must be intended that a prescription was given in evidence."³ In another, it was said "*Currere consuevit* had been held well enough in case of a watercourse, because that must be time immemorial;"⁴ in another, "If I have a right from usage as *currere solebat*, I have the right in such manner as the usage has been."⁵ There is another instructive case reported in several reports.⁶ In this case plaintiff declared, among other words, that the water "*currere consuevit et debuit* to a mill of the plaintiff,"⁷ which was held a sufficient pleading both below and on appeal. The watercourse was an artificial one.⁸ In

¹ Palmer 444, Popham 169, 3 Bulstrode 339, Noy 84, Latch 153, W. Jones 145.

² Lord Blackburn in Dalton v. Angus, 6 App. Cas. 825.

³ Roswell v. Prior, 1 Ld. Raym. 392.

⁴ Powell, J., in Tenant v. Goldwin, 2 Ld. Raym. 1089, 1094.

⁵ Brown v. Best, 1 Wils. 174.

⁶ Palmer v. Kebelthwaite, 1 Show. 64, Skinner 65. In Mason v. Hill, 5 B. & Ad. 1, Lord Denman speaks of these two reports of the case, and says: "The final result of the case does not appear in the books, and the roll has been searched for it in vain," but the report of it on appeal appears in four different reports, viz.: Skinner, 175, Carth. 85, 3 Mod. 48, Holt 5. See also 3 Lev. 133.

⁷ 1 Show. 64.

⁸ Carth. 85.

support of the pleading, plaintiff's counsel argued among other things, that "The words *ab antiquo et solito curso* amount to as much as if it had been said *de jure currere debuisset et consuevit*," and the report says¹ "The judgment was affirmed, but Holt, C. J., said, that if the cause had been tried before him, the plaintiff should have proved his mill to be an ancient mill, otherwise he should have been nonsuit," showing that the words *consuevit et debuit* were taken by Holt as referring to prescription. In another report of the same appeal² plaintiff's counsel speaks of certain cases as "those cases are wherein the plaintiff declared that the water *currere consuevit et debuisset* to the plaintiff's mill time out of mind; which words are of the same significance as if he had showed it to be an ancient mill. . . . The word *solet* implies antiquity . . . and it was the opinion of a learned judge³ that the words *currere consuevit et solebat* did supply a prescription or custom." The report says, "The word *solet* implies antiquity and will amount to a prescription," adding the expression of Holt, C. J., given above to this effect, whereby he must have meant that, since the pleading was based on prescription, it could only be supported on the trial by proof that the use was in fact ancient, which the words *currere consuevit debuit* or *solebat* must be taken as having alleged. These cases show that the common law of watercourses was at one time based on an analogy to prescription or ancient custom, and that the maxim "*aqua currit et debet currere ut currere solebat*" is merely a survival of this stage of the law; a stage now, of course, long discarded, though the maxim has survived.⁴

With this digression, we return again to the main discussion. The peculiar nature of running water was referred to in one of the old cases holding that ejectment would not lie for a watercourse; that livery could not be made of it, "for *non moratur*, but is ever flowing," and comparing running water to the water in the sea.⁵

¹ Carth. 85.

² 3 Mod. 48.

³ Citing Doderidge, J., in *Shury v. Piggott*, Poph. 171, above quoted.

⁴ "We may consider therefore, that this proposition is indisputable; that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, or *presumed grant*." Lord Wensleydale in *Chasemore v. Richards*, 7 H. L. Cas. 349. See also *Dickinson v. Canal Co.*, 7 Exch. 299; *Magistrates v. Elphinstone*, 3 Kames Dec. 332 (Scotch), saying "This right he has from the law of nature, *without the aid of prescription*." See also *Countess of Rutland v. Bowler*, Palmer 290; *Prickman v. Tripp*, Skin. 389, Comb. 231; *Acton v. Blundell*, 12 M. & W. 324; *Cox v. Matthews*, 1 Vent. 237; *The King v. Directors of Bristol, etc., Co.*, 12 East 429.

⁵ *Chancellor v. Thomas*, Yelv. 143.

Blackstone contains several emphatic statements of the principle, laying it down as the settled law of England. He says: "But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common. . . . Such (among others) are the elements of light, air and water," and he also speaks of "the very elements of fire or light, of air and of water. A man can have no absolute permanent property in these, as he may in the earth and land, since these are of a vague and fugitive nature;" and again: "For water is a movable, wandering thing, and must of necessity continue common by the law of nature."¹

The beginning of the nineteenth century saw a re-examination into the nature of rights in running water. In 1805, in *Bealey v. Shaw*,² Lord Ellenborough laid down the right, but without discussing the foundation of it.³ In 1824, however, in *Williams v. Moreland*⁴ appear the expressions, "Flowing water is originally *publici juris*," and "running water is not, in its nature, private property," and in 1831, in *Liggins v. Inge*,⁵ "Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light and air were considered as some of those things which had the name of *res communes*, and which were defined 'things the property of which belong to no person,' " etc. In *Wright v. Howard*,⁶ it was said of a stream, "there is no property in the water."

We reach now the authorities upon which the modern law of watercourses rests. In *Mason v. Hill*,⁷ decided in 1833, Lord Denman elaborately considered the attitude of the law towards running water, with the intention expressed, "to discuss, and, so far as we are able, to settle the principle upon which rights of this nature depend," and this case has been generally accepted as accomplishing this result, settling the common law of watercourses in its present form.⁸ Lord Denman quotes at length from the civil law, and says concerning it: "No one had any property in the water itself except in that particular portion which he might have

¹ 2 Bl. Com. 14, 18, 395.

² 6 East 208.

³ In 12 East 429, he says the right rests on prescription.

⁴ 2 B. & C. 910.

⁵ 7 Bing. 692.

⁶ 1 Sim. & St. 190.

⁷ 5 B. & Ad. 1.

⁸ See to this effect regarding *Mason v. Hill*, *supra*; *Cocker v. Cowper*, 5 Tyrw. 103; *Embrey v. Owen*, 6 Exch. 352; *Stockport W. W. v. Potter*, 3 H. & C. 323; *McGlone v. Smith*, L. R. 22 Ir. 568; *Lord Blackburn in Orr Ewing v. Colquhoun*, 2 App. Cas. 854; *Gale, Easements*, 8 ed. (1908), 258.

abstracted from the stream and of which he had the possession, and during the time of such possession only," and says that the expressions in Blackstone and the common law cases just quoted calling running water *publici juris*, simply adopted into the common law this principle that the water itself was not the subject of private ownership.

This was followed very explicitly in the succeeding English cases. In one¹ it was said, "Flowing water, as well as light and air, are in one sense '*publici juris*.' They are a boon from Providence to all and differ in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some." And in the classical case of *Embrey v. Owen*,² this finds what may be called its crystallized expression in the English reports. In this case Baron Parke (who had also taken part in the judgment in *Mason v. Hill*) said: "Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have a right of access to it; that *none can have any property in the water itself*, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it." As late as the 1906 Appeal Cases the Chancellor said that running water is *publici juris*, and a claim to ownership of the *corpus* of the water of a stream was said by another of the Lords to be "opposed to elementary ideas about the water of a river," and "repugnant to the general law of rivers."³

In American cases the doctrine is announced. For example, it is laid-down in the very earliest Pennsylvania and Connecticut reports. Referring to the authorities, Gibson, C. J., says: ⁴ "They establish that the use of water, flowing in its natural channel, like the use of heat, light or air, has been held by every civilized nation, from the earliest times, to be common by the law of nature; and not merely public, like the use of a river or a port, which is subject to municipal regulation by the law of the place. They establish, also, that the domestic uses of water are its natural and

¹ *Wood v. Waud*, 3 Exch. 748.

² 6 Exch. 355.

³ *White v. White*, [1906] A. C. 83.

⁴ *Mayor v. Commissioners*, 7 Pa. St. 363.

primary ones. Air is not more indispensable to the support of animal or vegetable life. Water is borne by the air, in the form of vapor, to the remotest regions of the earth, for the free use and common refreshment of mankind; and to interdict the use of the one within any given locality, would be as monstrous and subversive of the scheme of animal existence, as it would be to interdict the use of the other. It is only when it has been received on the surface of the earth, not while it is falling from the clouds, that it can be made to minister to the ordinary wants of life; and if it be common at first, it must continue to be so while it is returning, by its natural channels, to the ocean. No one, therefore, can have an exclusive right to the aggregate drops that compose the mass thus flowing, without contravening one of the most peremptory laws of nature. Water may be exclusively appropriated by being separated from the mass of the stream, and confined in tanks or trunks, but then it would have ceased to be *aqua profluens*." And he adds that a grant of water power "is not a grant of property in the *corpus* of the water as a chattel."¹

Numerous other authorities to this same effect appear later in this discussion; but we trust we have given enough to show, for the present, the attitude of the law that running water, unrestrained in its natural course, belongs to the negative community and is nobody's property; its particles or aggregate drops, in specie or as a substance, being outside the domain of what can constitute property; just as no one can be said to own the air, the sea water, the rain or the clouds or the moon or stars, or the pearl at the bottom of the sea, the wild animals in the forest, or the very fish swimming at large in the running stream itself. Like all these things, running water is a substance wandering at large, obeying its own will and ever changing its form and position, uncontrolled by man, and with them, moves in the negative community. This has been the prevailing attitude of the law from Roman times to the present day, as will appear even more strongly as the discussion proceeds.

II. THE USUFRUCT.

While the *corpus* of naturally running water is thus in the negative community and not the subject of private ownership, the law recognizes nevertheless a very substantial right in its use and flow, — the right to have the liquid flow and to use it, which the law calls

¹ And see *Mitchell v. Warner*, 5 Conn. 519.

the "usufructuary right," or the "water right." The law of water-courses consists of the rules governing this right of flow and use. We do not stop long over this, merely giving authorities to show the distinction between the usufruct and the water itself.

There is in the civil law a large body of law known as the law of the "usufruct."¹ One civil law writer says, continuing a passage quoted above:² "Though not susceptible of being property, things of this nature [the negative community] do not the less fall within the province of the law, for the regulation of their *use*, which is not absolutely abandoned to the caprice of all."³ Puffendorff, speaking of the air, one member of the negative community, says: "So, though no one will pretend to fix a property in the wind, yet we may appoint a service or duty of not intercepting the wind to the prejudice of our mills."⁴ Another civil law authority,⁵ speaking of a riparian proprietor owning both banks of a stream, says of the water: "It is not his own as to property, but only as to the use which he can make of it in its passage."

In the old case of *Shury v. Piggott*, we recall the passages already quoted,⁶ where it is said that *aqua profluens* is in a class with the air, and man's right therein includes no interest in the land but only a right to the continuance of the *flow*. Blackstone says: "For water is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient *usufructuary* property therein."⁷ One well-known English case says: "The property in the water itself was not in the proprietor of the land through which it passes, but only the *use* of it, as it passes along, for the enjoyment of his property, and as incidental to it."⁸ The classical English expression is in *Embrey v. Owen*,⁹ saying, as already quoted,¹⁰ that flowing water is *publici juris*, in which, itself, none can have any property, but may have a right to reasonably use it. "Each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it," the right to the

¹ 1 Inst., tit. IV, V; 7 Pandects. See Noodt's "De Usufructu," opp. tom. 1, pp. 387-478.

² P. 191, *supra*.

³ "Quoique non susceptibles de propriété, les choses de cette nature n'en tombent pas moins sous l'empire du Droit pour le règlement de leur usage, qui n'est pas, d'une manière absolue, abandonné à la discrétion de tous." 2 Aubry & Rau, Droit Civile Français, 4 ed., 35, citing Code Napoleon, § 714.

⁴ 4 Puffendorff, c. 5, § 2.

⁵ Hall, Mexican Law, § 1392.

⁶ P. 194, *supra*.

⁷ 2 Bl. Com. 18.

⁸ *Wood v. Waud*, 3 Exch. 775, citing Story and Kent.

⁹ 6 Exch. 352.

¹⁰ P. 198, *supra*.

benefit and advantage of the water as it flows past. Another English case says: "All that a riparian proprietor is entitled to is *flumen aquae*; but no atom of the water belongs exclusively to him."¹

In the American cases the same doctrine is just as firmly laid down. Mr. Justice Story says:² "But, strictly speaking, he has no property in the water itself, but a simple use of it as it passes along." And Kent:³ "He has no property in the water itself but a simple usufruct as it passes along." In a New York case it is said:⁴ "Another maxim, flowing from the one above stated [*aqua currit*] is, that the owner of the bed of the stream does not own the water, but he only has a mere right to its use; he has a mere usufruct."

The California court has laid this down in many cases. In the very earliest case upon the subject it is said: "It is laid down by our law writers that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."⁵ In *Lux v. Haggin*⁶ the court elaborately reviewed the entire law of waters, and this is there laid down: "As to the nature of the right of the riparian owner in the water, by all the modern as well as ancient authorities the right in the water is *usufructuary* and consists not so much in the fluid itself as in its uses." Many other California cases, hereafter cited, lay this down, and so do the other Western courts, such as, for example, the Nebraska court, saying: "The law does not recognize a riparian property right in the *corpus* of the water. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows through the land, subject to a like right belonging to all other riparian proprietors."⁷

This principle of a private right in the use as distinguished from the substance itself is taken from the law of "usufruct" in the Institutes,⁸ and is well recognized today. This usufructuary right, or "water right," is the substantial right with regard to flowing waters; is the right which is almost invariably the subject-matter

¹ Earl, C. J., in *Medway Co. v. Romney*, 9 C. B. N. S. 586.

² *Tyler v. Wilkinson*, 4 Mas. (U. S.) 397.

³ 3 Com. Marg. 439.

⁴ *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 71 (1866).

⁵ *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408. See also *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

⁶ 69 Cal. 255, 10 Pac. 674.

⁷ *Crawford, etc., Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889.

⁸ *Supra*.

over which irrigation, or water power, or similar contracts are made and litigation arises, and is real property.

The law on our subject, then (borrowing from the civil law), is but a development of the exercise of this usufructuary right, and of the severance in pursuance of it of a portion of the water from the natural stream. The water in the stream itself is nobody's property. The right (called "usufructuary") may exist to take of it and to have it flow to the taker for his use. The part taken in the fulfilment of this usufructuary right is the private property of the taker while in his possession, and it is to this proposition that we now proceed.

III. SEVERED WATER.

The development of the law of running waters carries the foregoing to its conclusion, whereby the stream water, which while in the stream is not a substance the subject of property, finally passes into private ownership. This occurs when some portion of it is taken out of its natural course, severed from the stream, and reduced to possession. A water right is a usufruct in the stream, consisting in the right to have the water flow so that some portion of it (which portion the law limits in various ways) may be reduced to possession and made the private property of an individual.

In the civil law it is said: "Upon these principles, running waters are held by the Roman *juris-consulti* to be common to all men. But it also follows that this decision does not apply to waters, the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain purpose, as water included in a pipe or other vessel for certain uses."¹ And commenting upon a passage in the Institutes, a Scotch case says: "*Water drawn from a river into vessels or into ponds becomes private property.*"² No one owns the air, but the inventor who liquefies it owns so much as is liquid in his laboratory: it is his private property while in his possession.

The common law is stated in identical terms. "None can have any property in the water itself, *except in the particular portion which he may choose to abstract from the stream* and take into his

¹ Bowyer, Commentaries on Civil Law, 61.

² Adding, "but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country." *Magistrates v. Elphinstone*, 3 Kames, Dec. 331 (Scotch).

possession, and that during the time of his possession only."¹ In a well-known case in the House of Lords² it is said that no one can have any property in the running water of the stream, "which can only be *appropriated by severance*, and which may be lawfully so appropriated by every one having a right of access to it" (the riparian proprietors). Lord Campbell declared³ that water in a cistern is private property; and in a very recent case in the House of Lords the Chancellor said that water in an artificial pond is "water with somewhat of a proprietary right."⁴

In a New York case it is laid down: "Water, when reduced to possession, is property, and it may be bought and sold and have a market value, but it must be in actual possession, subject to control and management. Running water in natural streams is not property and never was."⁵ The California Court very clearly expressed the theory of the law when, in words similar to those of the House of Lords above quoted,⁶ it said: "He does not own the *corpus* of the water, but incident to his riparian ownership is the right to appropriate a certain portion of it. It is only, I think, by some species of appropriation that one can ever be said to have title to the *corpus* of the water."⁷

the nature of the right existing in naturally running water is thus that of having it flow and of taking it into possession by diverting it into artificial structures, ditches, reservoirs, cisterns, canals, pipes, and the like, thereby making private property of a part of it during the time it is held in possession and control. Being naturally a member of the negative community, the law recognizes only a right to use and take of it, and to have it flow to the taker so that it may be used and taken (a usufructuary right); but when taken from its natural stream, so much of the

¹ Embrey v. Owen, 6 Exch. 352; Mason v. Hill, 5 B. & Ad. 1.

² Lyon v. Fishmongers Co., 1 App. Cas. 673.

³ Race v. Ward, 3 E. & B. 710.

⁴ Lord Halsbury in White v. White, [1906] A. C. 84.

⁵ But adding that building a dam across a river so as to form a reservoir is not reducing it to possession. City of Syracuse v. Stacey, 169 N. Y. 231, 245, 62 N. E. 354, 355.

⁶ Lyon v. Fishmongers Co., *supra*.

⁷ Vernon Irr. Co. v. Los Angeles, 166 Cal. 237, 39 Pac. 762. One general authority says: "Ownership of water in canal: The water in a canal is the sole property of the canal owners." 5 Am. & Eng. Ency. L. 113. The right to take water out of another's pond is a profit *à prendre*. Angell, Watercourses, 7 ed., 245; Hill v. Lord, 48 Me. 83, dictum. But not so of the right to take water from his spring. Race v. Ward, 3 E. & B. 710.

substance as is actually taken is severed from the negative community, and, passing under private possession and control, becomes private property during the period of possession and control. The *corpus* of the water severed from the stream in a reservoir or ditch or other artificial receptacle is private property as a commodity; it ceases to be without ownership, but is "water with somewhat of a proprietary right."

In the negative community there is a still more familiar member, namely, animals *ferae naturae*, with which, also, running water has been compared, even so far as to name it accordingly a "mineral *ferae naturae*," and which likewise become private property by capture.

In the first place, wild animals are, by settled law, members of the negative community; they are nobody's property while wandering at large; and, in the next place, we find running water compared to animals *ferae naturae* ever since the Institutes. In the Institutes the law of wild animals follows under the same title as that above quoted concerning *aqua profluens*, thus: "Likewise wild animals, birds, and fishes, since before capture belonging to no one, after capture belong to him who captures them."¹ Vattel² gives together as the things of which no one claims the property, "the air, the running water, the sea, the fish and wild beasts." Vinnius, in commenting on the Institutes,³ says fish are among the things common while in the ocean, but cease to be such the moment they are caught.

Following the particles of the liquid from the stream into a ditch into which they have been diverted, there then has come a change in the "wandering" of the liquid that has been taken into the ditch. It is like the change brought about when wild birds are caught in a snare, wild animals caged, fish caught in nets. Before capture none of these are regarded as property, real or personal, being wandering, ownerless things, but after capture they become the private property of the taker. While swimming in the stream, the fish in the water are no more the subject of private ownership than the water they swim in, and, though

¹ 2 Inst., tit. 1, § 12. "*Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra, mari, caelo nascuntur simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupantis conceditur.*"

² P. 191, *supra*.

³ 2 Inst., tit. 1, § 1.

one may own the usufructuary right of fishing, nobody owns the fish themselves;¹ but the fisherman owns them when caught in a net.² So the particles of water that have passed into private control in a reservoir, ditch, or other artificial structure, have been taken from their natural haunts, so to speak, and captured. This comparison was made by Field, J., with regard to the water in the reservoirs of the Spring Valley Water Company, which supplies San Francisco.³ Chancellor Kent says: "The elements of air, light, and water are the subjects of qualified property by occupancy," and then, in the same paragraph, proceeds to the law of wild animals, as being based on the same principle.⁴ The leading authority in the common law for this comparison is Blackstone, who says: "But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an *usufructuary* property is capable of being had; and, therefore, they belong to the first occupant during the time he holds possession of them and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *ferae naturae*, or of a wild, untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward."⁵

To avoid misunderstanding, it must be well noted that this passage distinguishes the *corpus* of water from the usufructuary right in the stream, and that when Blackstone here says that every man has an equal right to seize and enjoy, he is referring to the particles or drops, which no man can trace or identify as having been formerly in his possession, and which consequently he can lay no claim to

¹ *People v. Truckee, etc., Co.*, 116 Cal. 397, 58 Am. St. 183, 39 L. R. A. 581, 48 Pac. 374; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. 129, 37 Pac. 402.

² *Young v. Hichens*, 6 Q. B. 606, 51 Eng. Com. L. 606.

³ *Spring Valley W. W. v. Schottler*, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. at p. 183, Field, J., *arguendo*.

⁴ Kent, Commentaries, Part V, c. 35, p. 347.

⁵ 2 Bl. Com. 14. See also pp. 18, 395.

because of such former possession. Instead, any one to whom the escaped or abandoned particles come may seize and use them in the same manner as any other particles, and under the same considerations as govern his right to such other. The escaped or abandoned particles pass under any usufruct that may exist in the stream they have mixed with, be the owners of that usufruct who they may, and without, for the present purpose, specifying who the owners of the usufruct may be. The statement applies only to the *corpus* of the water (the ownership of the usufruct has been evolved into the law of riparian rights, or, in the West, into the law of appropriation), and shows how the *corpus* is not the subject of property while flowing naturally; is private property during capture; and again ceases to be property when possession ceases (property in the *corpus* being lost by the escape of water or its abandonment, whereupon the particles again cease to be property, and are again nobody's property, completing the cycle).

This analogy of *running water* to animals *ferae naturae* is complete, from the days of the Roman law to our own time. The analogy does not, of course, exist to the same extent to percolating water, because in *Acton v. Blundell*¹ a distinction was made between the two. A different rule of ownership, the *cujus est solum* doctrine, was applied to percolating water, whereby, even in its natural state, it is the private property (real property) of the landowner in whose land it exists. This is the great difference in the attitude of the law toward percolating water and the running water of streams.² There is to-day, however, a tendency to abandon this rule of *Acton v. Blundell*,³ and thus to class all water, percolating as well as running, as a "mineral *ferae naturae*." Some authorities, thus merging the different kinds of water, are stated and reviewed by the Supreme Court of the United States in *Ohio Oil Co. v. Indiana*.⁴ This is, of course, a fundamental departure as regards percolating water, and the court did not go the whole length of putting it absolutely, like running water, into the negative commu-

¹ 12 M. & W. 324.

² "There is only one case in law in which water in its natural state is the subject of ownership, and that is the case of percolating water. A man is regarded as owning the percolating water while it is in the land. But other water in its natural state is subject only to the use of the man through whose land it flows. He had a right to use but is not regarded as having the title." Goodwin, *Real Prop.*, 2.

³ The writer has collected most of the recent cases in *Water Rights in the Western States*, 2 ed., 578.

⁴ 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729.

nity. The *cujus est solum* doctrine withheld the court somewhat, and it said the analogy as to percolating water is not complete. In reading this opinion, it must be borne in mind that the court's hesitation has reference solely to percolating water, concerning which the analogy is a very recent departure or "new rule," and involves the rejection of *Acton v. Blundell*.

The case dealt with natural gas, to which the court also tentatively applied the principle, speaking of percolating water only as an analogy; classing natural gas, oil, and percolating water together as "minerals *ferae naturae*," but with some hesitation, induced by the *cujus est solum* doctrine which has hitherto applied to them in contrast to *running water*. Mr. Justice White, delivering the opinion, said these have no fixed *situs*, but, on the contrary, have the power, as it were, of self-transmission, and are of a peculiar character. He recognizes that the *cujus est solum* doctrine makes them the landowner's property, and yet says that cannot absolutely be, but that property can be based in them only when subject to control, as in a well, for example. When they escape or come under another's control the title of the former is gone. He quotes with approval a Pennsylvania case wherein it is said that while these things are minerals, they are minerals with peculiar attributes.¹ Other cases are cited in which the phrase "mineral *ferae naturae*" is used. Only when reduced to actual possession do they become the subject of ownership, and then they are like any other property, the subject of ordinary commerce.² Mr. Justice White says the landowner has the right on his land to bore wells and otherwise seek to acquire these things, but that "until these substances are actually reduced by him to possession, he has no title whatever to them as owner," and uses the expression that "things which are *ferae naturae* belong to the 'negative community.'" Proceeding to a conclusion, however, regarding natural gas, with which the case dealt, he cannot consider the analogy complete. This is because of the conflict with the *cujus est solum* doctrine, which he was not ready to reject entirely; and because, if the analogy to the negative community were absolute, he saw no way to exclude the public from taking as well as the land-owners.

It is not our object to enter this discussion as to natural gas, oil,

¹ *Brown v. Vandergrift*, 80 Pa. St. 142, 147.

² Citing *State ex rel. Corwin v. Indiana, etc., Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59, 31 Am. St. 433, 16 L. R. A. 443.

or percolating water; as we trust we have shown the settled view of the law toward running water (*aqua profluens*). Yet we would mention with regard to Mr. Justice White's two grounds of hesitation, that as to the first, the *cujus est solum* doctrine not only never has any bearing as to running water, but is being in contemporaneous cases rejected also as to percolating water;¹ while as to the second, the general public is excluded from the use of *running water* for the reason that, while its *corpus* is owned by no one, the taking thereof is confined to riparian proprietors because they, as the owners of the enclosing lands, alone have access to it, the lack of access excluding all non-riparian owners; following which all riparian proprietors, having equally the right of access, must exercise the resulting usufruct reasonably, with due regard to the rights of their neighbors on the stream.²

From *Ohio Oil Co. v. Indiana*, the term "*mineral feræ naturæ*" is passing into the textbooks. For example, "Water, oil, and still more strongly gas, may be classed by themselves, and have been not inaptly termed *minerals feræ naturæ*."³

This analogy to *running water* is finally shown by the authorities with which we close this topic. Just as wild animals, by capture becoming private property, are personalty, so likewise running water, severed from its natural wandering, and confined under private control in a reservoir, artificial watercourse, or other works of man that reduce it to possession, becomes personal property.

The individual particles of water, so impressed by diversion into

¹ See recent cases collected in Wiel, *Water Rights in the Western States*, 2 ed., 578.

² We have set this forth at some length in Wiel, *Water Rights in the Western States*, Part II, Ch. II, and can here merely cite a few authorities to the effect that the riparian right to the use of a water course arises out of the exclusion of non-riparian owners because their lands have no access to the stream. *Lyon v. Fishmongers Company*, 1 App. Cas. 673; *Embrey v. Owen*, 6 Exch. 352; *Cocker v. Cowper*, 5 Tyrw. 103; *Race v. Ward*, 3 E. & B. 710; *Stockport W. W. v. Potter*, 3 H. & C. 300; *Lord v. Commissioners*, 12 Moore P. C. 473; *North Shore Ry. v. Pion*, 14 App. Cas. 612; *McCartney v. Londonderry Ry.*, [1904] A. C. 301 (per Lord Macnaghten); *Nelson, J.*, in *Howard v. Ingersoll*, 13 How. (U. S.) 426, 14 L. Ed. 209; *Haupt's Appeal*, 125 Pa. St. 211, 17 Atl. 436, 3 L. R. A. 536; *Gould v. Hudson, etc., Co.*, 6 N. Y. 542; *Lux v. Haggin*, 69 Cal. 255, 333, 413, 10 Pac. 674; *Heilbron v. Fowler, etc., Co.*, 75 Cal. 426, 7 Am. St. 183, 17 Pac. 535; *Lembeck v. Nye*, 47 Oh. St. 336, 21 Am. St. 828, 836, 24 N. E. 686, 8 L. R. A. 578; *City of Paterson v. East Jersey W. Co.*, 70 Atl. 472 (N. J. Eq.); *Bigham Bros. v. Port Arthur, etc., Co.*, 91 S. W. 848, 97 S. W. 686 (Tex., Civ. App.); *Lewis, Eminent Domain*, §§ 78-82, and especially § 83.

³ 21 Am. & Engl. Encyc. L. 417. See also 27 Cyc. 534.

a ditch and become *private property*, possess none of the characteristics of immovability that go with our conception of real estate; they are still always moving though privately possessed, having, as particles, the characteristics of personal property. The analogy to caged animals, snared birds, or fish in a net, shows well the point of view: the particles in the ditch, now private property, are personalty. This is the law, and is so laid down by Mr. Justice Stephen Field.¹ "Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise." This was said of the water in the same Spring Valley reservoirs as those involved in the Schottler case.² It was necessary to decide whether the Spring Valley Company, supplying San Francisco with water, was within a statute authorizing the formation of corporations for trade or commerce, and it was held that it was. The water so taken into an artificial structure is the subject of larceny at common law, as personal property,³ and that water in an artificial watercourse or appliance is personal property is stated in numerous other authorities.⁴

It is important to appreciate the origin of this rule, deduced from the fundamental civil law principle that the *corpus* of the water in a natural stream is *not* property, real or personal, in any sense of the word, but is in the negative community, which absolutely excludes the common-law maxim, "*Cujus est solum ejus est usque ad caelum*," from any application to the water of running streams. It is not a transition of the particles from realty to personalty by severance from the freehold, like fixtures or emblements; it is the transition from *not* property (neither real nor personal) to *private property*, by severance from the natural stream; from particles wandering "wild" to particles "captured" by diversion and reduced to private possession and control.⁵

¹ Heyneman v. Blake, 19 Cal. 579, cited by him with approval in the Schottler opinion, p. 205, *supra*.

² Quoted, p. 205, *supra*.

³ Fallon v. O'Brien, 11 Q. B. D. 21. Wild animals are not property in a natural state, and not the subject of larceny; but when brought into possession by being caught in a trap, they are then the subject of larceny as chattels. 25 Cyc. 17, article "Larceny," by Professor J. H. Beale.

⁴ Beatty, J., in Riverside Co. v. Gage, 89 Cal. 418, 26 Pac. 889; Ball v. Kehl, 95 Cal. 613, 30 Pac. 780; Parks Canal Co. v. Hoyt, 57 Cal. 44; Dunsmuir v. Port Angeles Co., 24 Wash. 114, 63 Pac. 1095; Farnham, Waters, 462.

⁵ Cf. Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, in which case the point was not, however, at all involved.

IV. APPLICATION OF THESE PRINCIPLES.

With regard to the practical application of the principle that the *corpus* of water severed from the stream in an artificial conduit or structure is personal property, the only difficulty is the danger that it may be given undue importance. Its value lies mostly in rounding out and thus re-enforcing the exceedingly important fundamental idea that the water in the stream itself is not property at all, and that one may have only the strictly usufructuary right to use the stream; as being merely one illustration of the fundamental distinction between the water itself and the right to have its continual flow and use. Were the principle to be, to any great extent, so applied as to regard cases as based upon property rights in running water as a substance it would be a perversion, for its true force lies in showing the opposite — that controversies must, as a rule, be decided with regard to the use of water, and not to its *corpus*. As was said by the California court: ¹ "This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself. We are not called upon (and courts seldom are) to determine the character of the property which the owner of a ditch has in the water actually diverted by and flowing in his ditch. With reference to such water, his power of control and right of enjoyment are exclusive and absolute, and *it is a matter of little practical importance whether, in a strict legal sense, it be or be not private property*. In regard to the water of the stream, his rights (an appropriator's), like those of a riparian owner, are strictly *usufructuary*, and the rules of law by which they are governed are perfectly well settled."

We will try to illustrate this. Where a contract has in view a natural stream, only the usufructuary water right can be its subject matter, as that alone constitutes private property. But where it concerns water in a ditch or pipe, etc., the *corpus* of water therein is now property which may also be the subject of contract. It then becomes a question of construction — of intention — whether, in the latter case, the parties contracted with a view to the sub-

¹ Cope, J., in *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

stance itself, or with a view to the "water right" in the stream from which the supply was drawn. A contract with a house supply company in a city is the typical case where the substance itself is the subject of the contract; and such a case is one of the sale of personal property.¹ But the situation in regard to irrigation or water power contracts is different. Granting that water in a reservoir, pipe, ditch, or other artificial receptacle is personal property, yet water power, or irrigation, or similar contracts and litigation deal with the water right, and not with any identifiable or specific particles of liquid or "very body of water" in the ditch. Title to any specific particle or particles of the liquid seldom becomes the subject of litigation, or contract, since irrigators or mill-owners invariably *mean* to contract concerning the water right, its flow and use. The contrary situation arises only in exceptional cases, as where one is prosecuted for larceny in taking water from a ditch or pipe,² in which case title to the specific particles stolen is involved, that is, specific particles of personal property.

If one artificially manufactures water from oxygen and hydrogen, and leads it into a ditch from the factory to a bottling works, and contracts with me about the water in the ditch, it is a contract concerning personalty; in that case there is no "water right" involved at all. If one has a spring of medicinal waters and collects the water in a reservoir preparatory to bottling, and contracts to sell *one reservoir full*, it would be a sale of personal property. Likewise, if he sells me so many gallons from the reservoir measured by a meter. The specific particles sold could be marked and set aside (by closing the reservoir and coloring the water red, for example). The very body of water in the reservoir at the time of purchase may have peculiar mineral properties not again occurring, so that the purchaser desires just that very water. But if he buys the right to have the mineral water flow from the spring, he contracts concerning the water right, concerning realty and not personalty. A city supply water company sells the householder so many gal-

¹ Heyneman v. Blake, 19 Cal. 595, Field, J., quoted *supra*, p. 209; Spring Valley W. W. v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48 quoted *supra*, p. 205; Hesperia, etc., Co. v. Gardiner, 4 Cal. App. 357, 88 Pac. 286. In Carothers v. Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314, the court compares gas companies (with which the case dealt) with city supply water companies, and says: "They produce, store, and supply to consumers water. Transportation by means of pipes is the means of delivery, and is a mere incident of the business."

² Fallon v. O'Brien, 11 Q. B. D. 21.

lons or cubic feet of liquid measured by a meter; it does not profess to grant a perpetual flow from a natural stream.

To give security to irrigators, irrigation contracts are generally viewed as having for their subject-matter the usufructuary right in the stream through the intermediate agency of the ditch, thereby making them contracts affecting real property,—the ditch and the water right in the stream from which the ditch heads. A contract granting a right to take water from a ditch for irrigation is held to grant a servitude upon real property, upon the canal and water rights of the grantor.¹ And the arid states have settled it as a fixed rule aside from contract that one who has a right to take water from a company's ditch is an appropriator from the natural stream through the intermediate agency of the ditch.² Rights for irrigation in the flow in a ditch thus relate back to the rights in the stream, and contracts refer back to the same subject-matter when concerning irrigation; though the distinction between the *corpus* of water and its use and flow would still prevail in such matters as larceny from a ditch, or contracts for house supply in cities, as previously mentioned.

When there is a contract for irrigation or mill power, it thus becomes a contract for flow and use from a natural stream (a usufruct) and not a contract concerning the *corpus*, or particles (even though they be personalty), such as a contract for a single ditchful of water would have been. It enforces the principle that "Whenever any corporation furnishes water to irrigate lands . . . the right to *flow and use* of said water is and shall remain a perpetual easement to the land."³ Irrigation contracts with irrigation companies have for their subject-matter the usufruct in the stream (and not the water itself) through the intermediate agency of the

¹ *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. 216; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858; *South Pasadena v. Pasadena Co.*, 152 Cal. 579, 93 Pac. 490; *Graham v. Pasadena*, 152 Cal. 596, 93 Pac. 498; *Orcutt v. Pasadena*, 152 Cal. 599, 93 Pac. 497; *Fudickar v. East Riverside Co.*, 109 Cal. 29, 41 Pac. 1024; *Farmers', etc., Co. v. New Hampshire, etc., Co.*, 92 Pac. 290 (Col.).

² *Wheeler v. Irrigation Co.*, 10 Col. 582, 3 Am. St. 603, 17 Pac. 487; *Combs v. Ditch Co.*, 17 Col. 146, 31 Am. St. 275, 28 Pac. 966; *Wyatt v. Larrimer, etc., Co.*, 18 Col. 298, 36 Am. St. 280, 33 Pac. 144; *Hard v. Boise, etc., Co.*, 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; *Gould v. Maricopa, etc., Co.*, 8 Ariz. 529, 76 Pac. 598. In the *Wyatt* case it is said: "The consumer under the ditch possesses a like property. He is an appropriator from the natural stream through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream and through the ditch for his use."

³ Cal. Civ. Code, § 552; Cal. Stat. 1885, 95, § 11½, as amended Stat. 1897, p. 49.

ditch, affecting the water right in the stream from which the ditch heads. So far as the water in the canal is personalty, it is personalty of the consumers as well as of the company, the company being chiefly the agent of the consumers to make the diversion and carry the water. The company is, in the decisions of the arid states, universally denominated simply "a carrier."

Another illustration is the rule that the landowner cannot claim riparian rights in an artificial canal crossing his land, because the *corpus* of the water therein is not *publici juris*, but is the private property of the canal owner. Still another illustration is the decision that the measure of damages for diversion of a natural stream is not the value of the water diverted at so much per inch or gallon as for goods sold and delivered.¹

V. CONCLUSION.

We have attempted to show the truth of the following three "first principles" of the law of running waters: (1) Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general. (2) With respect to this substance the law recognizes a right to take and use of it, and to have it flow to the taker so that it may be taken and used, — a usufructuary right. (3) When taken from its natural stream, so much of the substance as is actually taken is captured, and, passing under private possession and control, becomes private property during the period of possession.²

Samuel C. Wiel.

SAN FRANCISCO.

¹ Parks Canal Co. v. Hoyt, 57 Cal. 44.

² We gather in a note some of the authorities bearing upon these principles:
CIVIL LAW. — 2 Inst., tit. 1, § 1; 4 Puffendorff, c. 5, § 2; 3 *ibid.*, c. 3, §§ 3, 4; 1 Vattel, Law of Nations, 20; Nicasius, lib. 2, tit. 1, 89 b; Domat, Civil Law, § 416; Azo, see 8 Pub. Selden Society; Vinnius, quoted in Mason v. Hill, 5 B. & Ad. 1; Grotius, c. 2, s. 12; Boyer, Commentaries on the Civil Law, 61; 2 Aubry et Rau, Droit Civile Français, 4 ed., 34, 35; Code Napoleon, Art. 644 *et seq.*; Hall, Mexican Law, § 1392; Esriche, Aquas, and other Mexican authorities given in Lux v. Haggin, 69 Cal. 255, 315, 10 Pac. 674; Febrero Novissimo, T. 1, lib. 2, tit. 1 (rain water); Louisiana Code, Art. 657 *et seq.*

ENGLISH. — 2 Bracton, f. 7, § 5; Fleta, lib. 3, cap. 1, s. 4 (omits Aqua Profluens. Likewise 2 Britton, c. 2, § 1); Callis, Sewers, orig., ed., 78, quoted by counsel in 9 C. B. N.S. 587; 2 Bl. Com. c. 25, pp. 14, 395; Shury v. Piggott, Poph. 169; Magistrates v. Elphinstone, 3 Kames Dec. 331 (Scotch); Brown v. Best, 1 Wils. C. P. 174;

Williams v. Moreland, 2 B. & C. 910; *Liggins v. Inge*, 7 Bing. 692; *Manning v. Wasdale*, 5 A. & E. 758, 762; *Wright v. Howard*, 1 Sim. & St. 190; *Mason v. Hill*, 5 B. & Ad. 1; *Wood v. Waud*, 3 Exch. 748; *Embrey v. Owen*, 6 Exch. 352; *Dickinson v. Canal Co.*, 7 Exch. 301; *Race v. Ward*, 3 E. & B. 710; *Young v. Hichens*, 6 Q. B. 606; *Medway Co. v. Romney*, 9 C. B. N.S. 586 (Earle, C. J.); *Lyon v. Fishmongers Co.*, 1 App. Cas. 673; *Fallon v. O'Brien*, 11 Q. B. D. 21; *White v. White*, [1906] A. C. 83.

UNITED STATES AND FEDERAL. — *Howard v. Ingersoll*, Nelson, J., 13 How. (U. S.) 426, 14 L. Ed. 189; *Spring Valley W. W. v. Schottler* (Field, J.), 110 U. S. 373, 4 Sup. Ct. Rep. 48, 28 L. Ed. 183; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729; *Slack v. Walcott*, 3 Mas. (U. S.) 508, Fed. Cas. No. 12932 (Story, J.); *Tyler v. Wilkinson*, 4 Mas. (U. S.) 397, Fed. Cas. No. 14312 (Story, J.); *Webb v. Portland Cement Co.*, 3 Sumn. (U. S.) 189, Fed. Cas. No. 17322 (Story, J.); *Mohl v. Lamar Canal Co.*, 128 Fed. 776; *United States v. Conrad Inv. Co.*, 156 Fed. 127. *California*: *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408; *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140; *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528; *Crandall v. Woods*, 8 Cal. 136; *Hill v. King*, 8 Cal. 336; *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Heyneman v. Blake*, 19 Cal. 579; *McDonald v. Askew*, 29 Cal. 200; *Nevada, etc., Co. v. Kidd*, 37 Cal. 282; *Hanson v. McCue*, 42 Cal. 308, 10 Am. St. 299; *Los Angeles v. Baldwin*, 53 Cal. 469; *Pope v. Kinman*, 54 Cal. 3; *Parks Canal Co. v. Hoyt*, 57 Cal. 44; *Lux v. Haggin*, 69 Cal. 255, at 390, 10 Pac. 674; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. 561; *Green v. Carotta*, 72 Cal. 267, 13 Pac. 865; *Riverside Co. v. Gage*, 89 Cal. 410, 26 Pac. 889; *Ball v. Kehl*, 95 Cal. 613, 30 Pac. 780; *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762; *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; *Smith v. Green*, 109 Cal. 229, 41 Pac. 1022; *People v. Truckee, etc., Co.*, 116 Cal. 397, 58 Am. St. 183, 48 Pac. 374, 39 L. R. A. 581; *Gould v. Eaton*, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181; *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236 (Shaw, J.); *Calkins v. Sorosis Co.*, 150 Cal. 431, 88 Pac. 1094; *Duckworth v. Watsonville Co.*, 150 Cal. 520, 89 Pac. 338; *Hesperia, etc., Co. v. Gardiner*, 4 Cal. App. 357, 88 Pac. 286; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858. *Colorado*: *Saint v. Guerrero*, 17 Col. 448, 31 Am. St. 320, 30 Pac. 335. *Connecticut*: *Mitchell v. Warner*, 5 Conn. 519. *Idaho*: *Boise, etc., Co. v. Stewart*, 10 Idaho 38, 77 Pac. 25, 321. *Indiana*: *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 Am. St. 433, 16 L. R. A. 443, 31 N. E. 59. *Maine*: *Davis v. Getchell*, 50 Me. 604, 79 Am. Dec. 636. *Massachusetts*: *Cary v. Daniels*, 8 Met. (Mass.) 466, 41 Am. Dec. 532 (Shaw, C. J.); *Elliott v. Fitchburg Ry.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85 (Shaw, C. J.). *Nebraska*: *Crawford v. Hathaway*, 67 Neb. 325, 108 Am. St. 647, 93 N. W. 781, 60 L. R. A. 889. *Nevada*: *Stat.* 1907, p. 30, § 3. See *Van Sickle v. Haines*, 7 Nev. 249. *New Hampshire*: *Roberts v. Claremont Co.*, 66 Atl. 485. *New Jersey*: *Worthern v. White, etc., Co.*, 70 Atl. 471 (N. J. Eq.); *City of Paterson v. East Jersey W. Co.*, 70 Atl. 472 (N. J. Eq.). *New York*: *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Partridge v. Eaton*, 3 Hun (N. Y.), 533, 534; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Sweet v. City of Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *City of Syracuse v. Stacey*, 169 N. Y. 231, 245, 62 N. E. 354; *Wyandoch Club v. Davis*, 33 App. Div. 598, 53 N. Y. Supp. 993; *In re Board of Water Supply*, 109 N. Y. Supp. 1036. *Ohio*: *Walker v. Board of Works*, 16 Oh. 540; *Pollok v. Cleveland, etc., Co.*, 56 Oh. St. 655, 47 N. E. 582. *Pennsylvania*: *Haupt's Appeal*, 125 Pa. St. 211, 17 Atl. 436, 3 L. R. A. 536; *Mayor v. Commissioners*, 7 Pa. St. 363; *Lord v. Meadville W. Co.*, 135 Pa. St. 122, 20 Am. St. 864, 8 L. R. A. 202, 19 Atl. 1007; *Wilkes Barre Co. v. Lehigh Co.*, 3 Kulp. (Pa.) 389; *Clark v. Pa. Ry.*, 145 Pa. St. 438, 27 Am. St. 710, 22 Atl. 990; *Brown v. Vandergrift*, 80 Pa. St. 142, 147; *West Moreland Co. v. DeWitt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; *Jones v. Forest Oil*

Co., 194 Pa. St. 379, 44 Atl. 1074, 48 L. R. A. 748. *South Carolina*: Pugh v. Wheeler, 2 Dev. & B. (S. C.) 55. *Utah*: Bear Lake Co. v. Ogden, 8 Utah 494, 33 Pac. 135; Salt Lake City v. Salt Lake Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648, 25 Utah 456, 71 Pac. 1069. *Wyoming*: Willey v. Decker, 11 Wyo. 496, 100 Am. St. 939, 73 Pac. 210.

TEXTBOOKS. — Kent, Commentaries, Part V, § 35; Kent, Commentaries, 3 Com. Marg. 439; Washburn, Easements, 207; Pomeroy, Riparian Rights, § 55; Gould, Waters, 3 ed., § 236; Farnham, Waters, 462; Goodwin, Real Property, 2; Kinney, Irrigation, 398; Kerr, Injunctions, 4 ed., 179; Kerr, Real Property, § 111; 27 Cyc. 534; 29 Cyc. 334; 5 Am. & Eng. Encyc. L. 113; 21 Am. & Eng. Encyc. L. 417.

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THE AMERICAN TOBACCO COMPANY'S CASE AND THE SHERMAN ACT. — The Circuit Court of Appeals has recently decided that the American Tobacco Company and others of its controlled companies are combinations in restraint of trade under § 1 of the Sherman Act.¹ *United States v. American Tobacco Co.*, 40 N. Y. L. J. 69 (Circ. Ct., S. D. N. Y., Nov. 7, 1908).

The Supreme Court of the United States early decided that the Act went beyond what is said to be the common law restraint of trade in the strict sense and included restraint of competition.² But in further saying that the Act abolished as a criterion of illegality the old common law distinction between reasonable and unreasonable restraints, it is submitted that the court burned behind it the only bridge to a qualification of the unqualified words of the legislature which had any preëxisting foundation in the law and would yet protect legitimate combination. In the place of this common law test of reasonableness was substituted the test of directness, distinguishing those combinations which directly restrained interstate commerce from those whose restraint was merely indirect.³ This test of directness has been applied equally as a criterion for two entirely distinct questions — the constitutional question of the power of Congress over a combination, and the question of its illegality under the Act.⁴ This test was not voiced by the legislature and is not found in the common law. Nor is it a proper test of the constitutional power of Congress over the prohibited combinations. Congress has

¹ 26 U. S. Stat. at L. 209, which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or in the foreign nations."

² *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505. Cf. 17 HARV. L. REV. 474; 20 *ibid.* 167, 169.

³ *U. S. v. Trans-Missouri Freight Ass'n*; *U. S. v. Joint Traffic Ass'n*, *supra*; *Hopkins v. U. S.*, 171 U. S. 578.

⁴ See 17 HARV. L. REV. 533, 535.

no power under the Constitution to regulate matters which only remotely or incidentally affect interstate commerce, since action by it in such matters would not really be a regulation of interstate commerce. But if an act does really affect interstate commerce — whether directly or indirectly — it should be regarded as within the scope of the power of Congress. The constitutional question is not as to the manner in which commerce between the states is affected, but whether it is in reality affected at all.

The defendant tobacco companies relied much on *United States v. Knight*⁶ as authorizing their actions under the court's present test. There, a combination of sugar refineries was held to be engaged in manufacturing only, not in interstate commerce, and hence not within the Act. However the effect of such a combination of interstate manufacturers is directly to restrain competition in the sale of the product outside the state. Furthermore later decisions of the Supreme Court insist that "the most innocent and constitutionally protected of acts . . . may be made a step in a criminal plot"⁶ and that transactions in restraint of interstate commerce must be considered as a whole.⁷ Therefore, while Congress has no power to regulate manufacturing,⁸ it has power to regulate combinations of manufacturers formed to restrain interstate trade. Indeed, if commercial transactions are to be divided as in the Knight case into their integral parts, "Interstate Commerce" becomes restricted to transportation. But if they are to be considered as a whole, then the present combination, engaged in buying, manufacturing, and selling, seems on any test to be clearly within the Act.⁹

The Circuit Court of Appeals considered the Knight case as overruled. Only a year ago, however, the Supreme Court distinguished it from the case which the circuit court deems to have overruled it.¹⁰ It is submitted that, although there is a clear enough distinction in the degree of directness with which interstate commerce is affected, yet in both these cases there was really a direct effect. Furthermore, in a late case¹¹ a sale of a transportation line engaged in interstate commerce with an agreement not to compete was held not within the Act, though the restraint operated directly on interstate commerce, and the fact that the restraint was collateral to the main purpose of the contract does not affect the result on interstate commerce. In the Northern Securities case¹² Mr. Justice Brewer returned to the test of reasonableness. The test of directness, in the ordinary sense of the word, unflinchingly applied, is the *reductio ad absurdum* of the Act. In view of its recent decisions the court cannot be so using the word. Is it saving the Act and returning to the test of reasonableness by considering "directly," as it has used the word, synonymous with "reasonably" ?¹³

CONSTITUTIONALITY OF A STATUTE COMPELLING THE COLOR LINE IN PRIVATE SCHOOLS. — Mr. Justice Harlan, dissenting with one other justice

⁶ 156 U. S. 1.

⁶ *Aikens v. Mo.*, 195 U. S. 194, 206.

⁷ *Swift v. U. S.*, 196 U. S. 375, 396; *Loewe v. Lawlor*, 208 U. S. 274, 298.

⁸ *Kidd v. Pearson*, 128 U. S. 1.

⁹ *County of Mobile v. Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, 203.

¹⁰ *Loewe v. Lawlor*, *supra*.

¹¹ *Cincinnati Packet Co. v. Bay*, 200 U. S. 179.

¹² 193 U. S. 197, 361. See 17 HARV. L. REV. 474, 473.

¹³ *Cf.* 17 HARV. L. REV. 480.

from a recent decision of the Supreme Court, declares that a state law which forbids the joint education of white and colored persons in private schools violates the federal Constitution. *Berea College v. Commonwealth*, Nov. 9, 1908. The point is unsatisfactorily evaded by the majority, who hold the statute valid in the particular case as an amendment of a corporate charter. This conclusion involves questionable holdings as to the separability of legislation and the power to impair a corporate grant; the minority opinion on these points appears preferable. But had the main point been squarely met, it is believed that the same result would have been correct, and that herein the minority err.¹ The question is not one of race discrimination, since the statute affects white and black pupils alike; but simply whether the state has made such proper use of its police power that teachers and pupils, the freedom of whose action is thereby limited, cannot successfully invoke the fourteenth amendment.

Similar constitutional² and statutory³ provisions have been construed only in cases concerning public schools.⁴ It is settled that local officers of education may segregate the two races, provided they offer equal advantages to both;⁵ but they cannot assume to fix the policy of the state by drawing the color line without express statutory sanction.⁶ Such matters, however, of policy in the execution of a public function obviously present a different problem from the present.

No case with similar facts has been found; but the statutes prescribing "Jim Crow cars" raise an analogous point. The Supreme Court squarely held such legislation to be a valid exercise of the police power, Mr. Justice Harlan vigorously dissenting.⁷ It may be thought that this case was easier, and the dissent more clearly mistaken, because the state has peculiar control over common carriers. On the other hand, the policy of the state in segregating the races may be said to have more justification in the principal case, since the experience of children in school has deeper relation to the morals and health of the community than the mere superficial contact of passengers in railroad cars. The state's right to prohibit miscegenation is unquestioned;⁸ to prohibit joint education is not much more of a step. Mr. Justice Harlan alarmingly prophesies compulsory segregation in church, meeting-house, and market-place. The answer is that each case on the exercise of the police power will be decided according to its own facts, and will depend peculiarly little upon analogous precedents.⁹

THE CONSTITUTIONALITY OF STATUTORY COMMITMENT OF DEFENDANTS ACQUITTED OF CRIME BECAUSE OF INSANITY.—In a recent case the defendant was acquitted of homicide because of insanity at the time of the act. The court thereupon committed him to an asylum under a statute which provided for such commitment if in the opinion of the court

¹ Freund, *Police Power*, 718.

² Const. W. Va., Art. xii, § 8.

³ Cf. Ga. Code, § 1378.

⁴ *Martin v. Bd. of Education*, 42 W. Va. 514.

⁵ *Lehew v. Brummell*, 103 Mo. 546.

⁶ *Bd. of Education v. State*, 45 Oh. St. 555.

⁷ *Plessy v. Ferguson*, 163 U. S. 537.

⁸ *Ex rel. Hobbs, I Woods* (U. S.) 537.

⁹ See *Berea College v. Commonwealth*, 29 Ky. L. Rep. 284.

the defendant's discharge would be dangerous to the public safety. Subsequently a writ of *habeas corpus* was dismissed because in the opinion of the asylum superintendent the defendant continued to be insane. *People ex rel. Peabody v. Baker*, 59 N. Y. Misc. 359. Such statutes providing for confinement at the discretion of the court are common. Furthermore, the ultimate release of the prisoner is often made a matter of discretion.¹ This legislation has resulted from the extent to which the plea of insanity is carried under the control of expert testimony, and is an attempt to obviate the evils resulting from the introduction of a mass of unreliable evidence.² That such legislation is intended to abrogate the defense of insanity to an indictment for homicide is unbelievable; for this result would be wholly at variance with the recognized theory that punishment for crime is justifiable only after accountability for the act is proven.

As the statute deprives a person of liberty after an acquittal, its constitutionality must be tested by the provisions of the Fourteenth Amendment.³ And inasmuch as a person acquitted because of insanity at the time of the commission of the act is as clearly entitled to all his constitutional rights as if acquitted for any other reason, the alleged insane defendant's commitment, to be valid, must be by due process of law.⁴ In ordinary commitment proceedings the alleged insane person must have notice of the inquisition,⁵ and only after trial of the issue and verdict may a valid judgment of commitment be pronounced.⁶ Thus the due process clause secures to a person declared insane a regular judicial trial before a deprivation of liberty:⁷ in fact, in providing a fair trial there seems to be no distinction between alleged insanity and alleged criminality.⁸ Therefore, where a defendant has been acquitted because of past insanity, the question as to his present state of mind can be determined only after fair trial.⁹

It is obvious that during the trial of the indictment for homicide the issue of present insanity was not subjected to any judicial investigation,¹⁰ and the discretionary determination provided by these statutes for the commitment of insane defendants without any opportunity given for defense is made wholly on an *ex parte* proceeding.¹¹ It is, however, maintained that such commitment is valid because of the presumption of the continuance of insanity.¹² But obviously the existence of a presumption cannot of itself abridge the defendant's constitutional right to be heard in his own defense. And yet in so far as these statutes provide for a temporary confinement until a fair trial may be had, they should be upheld. For the right of the courts to confine an insane defendant was recognized at common law,¹³ and the public welfare demands that a person who may be dangerously insane should not be immediately set free. In view of these considerations the

¹ See *Gleavon v. West Boylston*, 136 Mass. 489.

² See *Underwood v. People*, 32 Mich. 1.

³ *Brown v. Urquhart*, 139 Fed. 846.

⁴ *In re Boyett*, 136 N. C. 415.

⁵ *State v. Billings*, 55 Minn. 467. *Contra*, *Dowdell*, Petitioner, 169 Mass. 387.

⁶ *People ex rel. v. St. Saviour's Sanitarium*, 56 N. Y. Supp. 431.

⁷ *Simon v. Craft*, 182 U. S. 427.

⁸ See *Buswell*, *Insanity*, § 19.

⁹ *Brown v. Urquhart*, *supra*.

¹⁰ *Shultz v. State*, 13 Tex. 401.

¹¹ *Van Deusen v. Newcomer*, 40 Mich. 90.

¹² *In re Brown*, 39 Wash. 160.

¹³ *Hadfield's Trial*, 27 How St. Tr. 1281; *Hale*, P. C. 32-35.

Fourteenth Amendment should be construed as securing to insane defendants, not the right to an unconditional discharge after acquittal, but the right not to be permanently deprived of liberty without a judicial trial.¹⁴ The New York statute makes no provision whatever for such a trial and would therefore seem to be unconstitutional.

THE DOMICILE OF PERSONS NON SUI JURIS. — Domicile is a relation between an individual and a particular locality or country. The domicile of origin continues until a domicile of choice is acquired by the act of residence in a particular place coupled with an intention to continue to reside there. Generally it is impossible for a person *non sui juris* to change his domicile; for he has no legal right to an intention of his own. But it is often important to determine to what extent some one else may change his domicile for him. The domicile of a wife is that of her husband, except that in most states she is allowed to acquire a different domicile for the purpose of suing for a divorce.¹ The domicile of an infant follows the father's, because the infant is an integral part of his father's home and cannot legally have a home elsewhere. The father may change it at will, subject to the exercise of the jurisdiction of equity to prevent acts to the prejudice of persons under legal disabilities.²

The power of a guardian to change the domicile of his ward presents a more difficult problem. When his father dies an infant's domicile remains that of the father, and neither the mother nor the next of kin has power to change it, since the infant does not bear the same legal relation to them as to his father. But if he in fact lives with his mother, she becomes his natural guardian, and can change his national domicile, so long as she remains unmarried.³ A legal guardian of the infant's person has been held not to have the same power.⁴ Within the state which appointed him the guardian has undoubted power to say where his ward shall make his home, and any place so designated will be regarded as the infant's domicile.⁵ As to his ability to affect his ward's domicile in a foreign jurisdiction the authorities are in conflict.⁶ The better view appears to be that the powers of the guardian do not extend beyond the boundaries of the state that appointed him.⁷ A New York justice of the peace is not a justice of the peace in Massachusetts; nor is a Massachusetts guardian a guardian in

¹⁴ *In re Brown, supra.*

¹ As a married woman is *non sui juris*, and, even in states where most of her disabilities are removed by statute, has no right to live apart from her husband until after the divorce, the general rule is theoretically wrong. She would have adequate protection if equity merely gave her the right to prevent her husband from changing her domicile after cause for divorce. See *Velverson v. Velverson*, 1 Sw. & Tr. 574; *Maguire v. Maguire*, 7 Dana (Ky.) 181. Cf. 20 HARV. L. REV. 416.

² In the case of father and child this jurisdiction is seldom exercised. It is more commonly used in the case of guardian and ward. See *School Directors v. James*, 2 W. & S. (Pa.) 568. As to emancipated minors, see 19 HARV. L. REV. 215.

³ See *Lamar v. Micou*, 112 U. S. 452. If there is no mother, a grandparent or other next of kin may be the natural guardian. *In re Benton*, 92 Ia. 202.

⁴ *Daniel v. Hill*, 52 Ala. 430. As to the powers of a testamentary guardian, see *Wood v. Wood*, 5 Paige (N. Y.) 596; *White v. Howard*, 52 Barb. (N. Y.) 294, 318.

⁵ *Kirkland v. Whately*, 4 Allen (Mass.) 462.

⁶ *Wheeler v. Hollis*, 19 Tex. 522; *Mears v. Sinclair*, 1 W. Va. 185.

⁷ *Story, Conf. L.*, § 499; *Rogers v. McLean*, 31 Barb. (N. Y.) 304, 309, 310. But see *State v. Lawrence*, 86 Minn. 310.

New York. Then, as he is not a guardian in the foreign jurisdiction, he cannot exercise an *animus manendi* for the infant therein. And the infant cannot by himself acquire a domicile of choice in the foreign jurisdiction, because he is under the same disability there as at home. Therefore, if the infant does in fact take up a residence in a new state, his domicile is still in the old.

The case of an insane person is somewhat different. His guardian's powers are restricted in the same way, and consent to a home outside the state does not affect the ward's domicile. But a person over whom a guardian has been appointed for insanity, although not yet adjudged insane, is not under a disability in a foreign state.⁸ If, in fact, he has enough intelligence left to have an intention, he can, by moving into the foreign state, acquire a domicile therein.⁹ This distinction seems to have been overlooked in a recent case, where an insane ward was allowed to acquire a domicile in a foreign state on the ground that his guardian had consented. *In re Kingsley*, 160 Fed. 275 (Dist. Ct., Vt.). As already pointed out, the guardian's consent is immaterial, since his powers do not extend to the foreign jurisdiction. The real question is whether, as a matter of fact, the incompetent has enough mind left to form an *animus manendi*.¹⁰

THE CONSTITUTIONAL QUESTION INVOLVED IN THE EXCLUSION OF ALIENS BY THE EXECUTIVE. — Under the Immigration Act of 1903 which denies admission to the United States to aliens who are "afflicted with a loathsome or with a dangerous contagious disease," Congress has enacted that a board of immigration officers shall decide all questions in dispute as to the rights of any alien to enter the United States and that its decision shall be subject to review by the Secretary of Commerce and Labor.¹ A recent case has construed the act to apply to aliens domiciled in the United States returning after a temporary absence abroad. *In the Matter of Hermine Crawford, alias Marie Mayvis*, 40 N. Y. L. J. 419 (Dist. Ct., N. Y., Oct. 28, 1908). The decision is in conflict with the weight of previous authority.² It is unquestioned that Congress has power to expel from the United States alien residents as well as immigrants;³ but in the absence of a clearly expressed intention of Congress to exclude the former the weight of authority seems sound in view of the construction of a former act.⁴

The difficulty in these cases, however, is not in construing the act, but in deciding what branch of the government is entitled to determine the status of the person whose right to enter or remain is in question — whether he is an alien resident, an immigrant, or a citizen. In view of the decisions of the Supreme Court in cases arising under the Chinese Exclusion Acts which hold that the finding of these facts as to citizenship by the executive officers

⁸ *Talbot v. Chamberlain*, 149 Mass. 57.

⁹ *Talbot v. Chamberlain*, *supra*. See *Concord v. Rumney*, 45 N. H. 423; *Urquhart v. Butterfield*, 37 Ch. D. 357.

¹⁰ *Culver's Appeal*, 48 Conn. 165.

¹ U. S. Comp. St. Supp. 1905, p. 274, § 25.

² *Rogers v. U. S.*, 152 Fed. 346; *U. S. v. Nokashima*, 160 Fed. 842.

³ *Fong Yue Ting v. U. S.*, 149 U. S. 698; *U. S. v. Turner*, 194 U. S. 279.

⁴ U. S. Comp. St. 1901, p. 1294; *In re Panzara*, 51 Fed. 275; *In re Martorelli*, 63 Fed. 437; *In re Ota*, 96 Fed. 487.

is conclusive,⁵ a different result can hardly be looked for under the Immigration Act of 1903. To be sure, if it is granted that the person in question is a non-resident alien, the case is clear; since the power to exclude aliens is political in its nature and therefore is no part of the power vested by the Constitution in the courts.⁶ But if it is disputed whether the person is in fact a non-resident alien, the decision of the executive officers should be reviewable by the courts upon a writ of *habeas corpus*. Upon the determination of this question depends the very jurisdiction of the ministerial officers, and it has always been held that the finding of facts upon which jurisdiction is based is reviewable by the courts irrespective of legislative sanction.⁷ Under the rule laid down in the Chinese Exclusive Acts a citizen of the United States may be declared by a board of immigration officers to be a non-resident alien afflicted with a dangerous disease and on appeal for a judicial determination of his citizenship the best he can expect is to have his case considered by a higher executive officer whose decision, if adverse to his claim, results in his deportation from the country. The rights in question are too sacred to be decided in such a way. No citizen of the United States can be deported from the country except as a punishment for crime, and then only after a trial by jury. This constitutional right Congress cannot take away. It would therefore seem that the finding of facts upon which citizenship is based is a judicial question, and it is difficult to see how Congress through its appointed agents can determine the existence of facts upon which depends a constitutional right which Congress is powerless to disturb.

PUTATIVE MARRIAGE.—The status of legitimacy was granted more freely by the civil than the common law.¹ The civilians regarded as legitimate the issue of a marriage contracted when at least one of the parties believed the marriage to be lawful.² This doctrine of putative marriage formed the basis of an ingenious contention in a recent English case. *Re Stirling*, [1908] 2 Ch. 334. Two persons domiciled in Canada or Scotland were married in California after the woman's former husband had obtained in North Dakota a divorce invalid in Canada or Scotland. Their child, if legitimate, was entitled to succeed to property in Scotland, and his counsel contended that since his parents had married under a *bona fide* mistake as to Scottish law, that is, a mistake of fact, the doctrine of putative marriage applied. The court refused to decide whether that doctrine was law in Scotland or whether the parents were domiciled in Scotland or Canada, but held, following an earlier dictum,³ that in any case the mistake as to the validity of the divorce would be a mistake of law, and hence the doctrine did not apply. In regard to the first point, the query whether the Scottish law recognizes putative marriages, there appear to be no modern decisions;⁴ that they are so recognized was affirmed by the leading modern writer⁴ on the subject, but his authority was impugned in the course of the argument in the principal case. Certainly the doctrine

⁵ *U. S. v. Tee Toy*, 108 U. S. 253.

⁶ *Fong Yue Ting v. U. S.*, *supra*. See 22 HARV. L. REV. 132.

⁷ *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 107-109.

¹ See 16 HARV. L. REV. 22 *et seq.*

² *Ibid.* 38.

³ See *Shaw v. Gould*, L. R. 3 H. L. 55, *per* Lord Colonsay, p. 97.

⁴ See Fraser, Parent and Child, 2 ed., 22 *et seq.*

has no standing in England,⁵ though it has been suggested as desirable legislation.⁶ In the United States⁷ it naturally occurs in the Louisiana code;⁸ other jurisdictions have recognized it only as part of the French⁹ or Spanish¹⁰ law. The liberal statutory regulations on this subject in almost every state, however, probably reach the same practical results.⁷

On the second point of the principal case, the broad holding that a mistake as to the legal effect of a previous divorce would not satisfy the requirements of the doctrine of putative marriage, the court seems twice misled. Tribunals administering the Napoleonic code have considered an honest misapprehension of the parent's own law sufficient to legitimize the offspring.¹¹ But if it be conceded that the parent's mistake must have been one of fact,¹² then the present decision, based on Lord Colonsay's suggestion³ that foreign law is fact only for purposes of evidence, may still be doubted; for in respect to a matter of substantive law, a mistake as to foreign law has been held to be a mistake of fact;¹³ and for the very purposes of applying the rule of putative marriage under the French code, a mistake by a foreign woman as to the validity of the divorce obtained by the other parent, a Frenchman, was treated as a mistake of fact.¹⁴ This particular result was correct, since the French law determines the validity of a marriage by the law of the parties' nationality;¹⁵ hence the foreign mother's belief as to the Frenchman's capacity was a belief as to French law, law foreign to her. But in the principal case, if the father's domicile is assumed to have been Scottish, the question of legitimacy depended upon Scottish law;¹⁶ under Scottish law the *lex loci* governs the marriage contract;¹⁷ therefore the parents misconstrued, if any, the law of California, and were entitled to the benefit of a mistake of fact. Such a line of reasoning apparently escaped both court and counsel in the case.

CONSIDERATION MOVING TO THE PROMISOR FROM ONE OTHER THAN THE PROMISEE. — It has long been deemed the established doctrine of the common law of England that "a stranger to the consideration can maintain no action on a contract."¹ On examination, however, the cases cited for the proposition seem to establish not so much that the plaintiff must be the source of the consideration as that he must not be a stranger to the promise.²

⁵ See 2 Roper, Husband and Wife, 2 ed., 465.

⁶ See Geary, Marriage, xi.

⁷ The so-called Enoch Arden statutes provide only for the mistaken belief as to the death of a former spouse. Cf. N. Y. Civ. Co. Pro., § 1745. One statute, however, provides also for a mistake as to the legality of a previous divorce. Comp. Laws of Utah, § 1185.

⁸ §§ 117, 118.

⁹ See *Re Hall*, 61 N. Y. App. Div. 266.

¹⁰ *Smith v. Smith*, 1 Tex. 621.

¹¹ *Succession of Benton*, 106 La. 494. See 15 HARV. L. REV., 393; Fraser, Parent and Child, *supra*.

¹² See *Fernex v. Floccard*, Jour. du Palais, 1870, 895 n. (5), where the reporter seems to think the point an open one.

¹³ *Haven v. Foster*, 9 Pick. (Mass.) 112.

¹⁴ *Fernex v. Floccard*, *supra*.

¹⁵ *i Toullier*, § 576.

¹⁶ *Shedden v. Patrick*, 5 Paton App. 194.

¹⁷ See 2 Fraser, Husband and Wife, 2 ed., 1297 *et seq.*

¹ *Crow v. Rogers*, 1 Str. 592.

² Am. Lead Cas. 176.

The cases are of two classes. (1) Often the plaintiff is the recipient of the promise as the agent of a disclosed principal who alone is entitled to maintain the action under the peculiar doctrines of the law of agency.³ (2) More often C is attempting to sue on a promise made by B to A, either for the exclusive benefit of C,⁴ or for the purpose of removing some liability of A to C.⁵ Such a plaintiff is not only a stranger to the consideration, but he is also a stranger to the promise, and it is submitted that this is the real objection to allowing him an action.⁶ Indeed, in one of the early English cases of this sort we find Patterson, J., willing to arrest judgment because "there is no promise to the plaintiff alleged."⁷ American courts have generally refused to follow the rigidity of the English common law, usually allowing the so-called beneficiary to maintain an action, even though not the promisee.⁸

These cases are to be contrasted with those of which a recent New York case is an example. The defendant, at the request of his father and in consideration of advances from the latter, promised the plaintiff to pay her an annuity. An action was allowed. *Hamilton v. Hamilton*, 112 N. Y. Supp. 10 (App. Div.). Here there was no consideration moving from the plaintiff and the English courts would probably have denied a right of action. Yet the case is clearly distinguishable from those of which *Lawrence v. Fox* is the familiar example; for here the plaintiff was the promisee.

It is laid down in the books that at common law "a binding promise vests in the promisee and in him alone."⁹ Frequently it is said that the promise and the consideration must unite in the plaintiff and that the consideration will draw to it the promise;¹⁰ but it is difficult to see how this can be when there is an express promise to a third person who is not a mere agent of a disclosed principal. In Massachusetts, where the erroneous doctrine of *Lawrence v. Fox* is not followed, a promisee from whom the consideration did not move has been allowed to sue in at least two cases.¹¹ Indeed, the leading Massachusetts case,¹² after laying down the rule that a stranger to the consideration may not sue the promisor, adds, "unless the latter has also made an express promise to the plaintiff." While it must be conceded that the historical development of the action of assumpsit out of the action of tort for deceit¹³ seems to necessitate a detriment to the plaintiff in order to support an action, it is difficult to see any practical objection to allowing C to sue on a promise made to him by B at the request of A, the latter having incurred legal detriment at the request of the promisor. Such has been the holding of American courts with reference to

³ *Gray v. Pearson*, L. R. 5 C. P. 568.

⁴ *Tweddle v. Atkinson*, 1 B. & S. 393.

⁵ *Bourne v. Mason*, 1 Vent. 6.

⁶ See Comstock, J., dissenting in *Lawrence v. Fox*, 20 N. Y. 268, 275. And see 15 HARV. L. REV. 767, 771.

⁷ *Price v. Easton*, 4 B. & Ad. 433.

⁸ See cases collected in Wald's *Pollock, Contracts*, 3 ed., 249, 256, 260.

⁹ Langdell, *Summary of the Law of Contracts*, § 62; *Esling v. Zantzinger*, 13 Pa. St. 50, 55.

¹⁰ *Tracy v. Gunn*, 29 Kan. 508; *Edmundson v. Penny*, 1 Barr (Pa.) 334.

¹¹ *Eaton v. Libbey*, 165 Mass. 218; *Cabot v. Haskins*, 3 Pick. (Mass.) 83. See also *Palmer Savings Bank v. Ins. Co.*, 166 Mass. 189, 195; *Marston v. Bigelow*, 150 Mass.

45, 53.

¹² *Exchange Bank v. Rice*, 107 Mass. 37, 43.

¹³ See 2 HARV. L. REV. 1-19, 53-60.

promissory notes,¹⁴ the modern conception of which rebuts any objection to the relevancy of these cases here based on the assumption that promissory notes are specialties requiring no consideration. The same result has been reached by a number of jurisdictions in cases of simple contract,¹⁵ and at least one state has a statutory declaration to that effect.¹⁶

RECENT CASES.

ADMIRALTY — DECREES — CHANGE IN TITLE IN CONDEMNED PRIZE. — The plaintiff sued on a policy of marine insurance for loss of his ship by perils of the sea. The ship was captured during the Russo-Japanese war by a Japanese cruiser, but was wrecked on the Japanese coast before reaching port. Subsequently the wreck was condemned as a prize. *Held*, that the insured cannot recover. *Andersen v. Marten*, [1908] A. C. 334.

For a discussion of the case in the lower court, see 21 HARV. L. REV. 55.

BANKRUPTCY — DISCHARGE — EFFECT OF COMPOSITION AGREEMENT IN EXERCISING STATUTORY CONDITION. — By statute the stockholders of a corporation were made personally liable for its debts after judgment against the corporation and petition of execution unsatisfied. A corporation filed a petition in bankruptcy and all suits against it were restrained. The plaintiff secured an order permitting him to bring action, but before judgment a composition agreement was accepted by a majority of the creditors against the plaintiff's rights and was ratified by the court. The plaintiff thereupon discontinued his suit. He then sued the stockholders on their statutory liability. *Held*, that he cannot recover. *Firestone Fire Co. v. Agnew*, 40 N. Y. L. J. 639 (N. Y. App. Div., Nov. 1908).

The confirmation of a composition agreement by the proper court has the same effect as a discharge in bankruptcy. *In re Merriman*, Fed. Cas. 9, 479. The purpose of requiring a judgment here as a condition precedent is to make the creditor prove the debt and exhaust his remedy against the corporation. *United Glass Co. v. Vary*, 152 N. Y. 121. When performance of such a condition is rendered impossible by operation of law, it is excused. *Flash v. Conn.*, 109 U. S. 371. But it has been held that the court, in order to enable the plaintiff to go against the sureties on an attachment bond, may render judgment with a perpetual stay of execution, against a discharged bankrupt. *Hill v. Harding*, 130 U. S. 699. *Contra*, *Johnson v. Collins*, 117 Mass. 343. This analogous case then is authority for saying that though the corporation is relieved from paying the debt, a special judgment may be had against it for certain purposes. The right to this anomalous action against the bankrupt makes the present decision logical. But as a matter of practical expediency, it seems doubtful whether the court should compel the plaintiff to pursue this fruitless action before he can reach the stockholders.

BANKS AND BANKING — BANKER'S LIEN — EFFECT OF VOID PAYMENT OF NOTES. — An insolvent corporation deposited funds in the defendant bank which held its notes, some unmatured. By checks drawn on its deposit within four months of its bankruptcy, the corporation paid the notes as they matured. The checks were given intending a preference, and were therefore voidable

¹⁴ *Eaton v. Libbey*, *supra*; *Mize v. Barnes*, 78 Ky. 506; *Horn v. Fuller*, 6 N. H. 511.

¹⁵ *Rector of St. Marks v. Tweed*, 120 N. Y. 583; *Bank v. Chalmers*, 144 N. Y. 432; *Williamson v. Yager*, 91 Ky. 282; *Cabot v. Haskins*, *supra*; *Van Eman v. Stanchfield*, 10 Minn. 255.

¹⁶ Ga. Civ. Code, § 3664. In *Bell v. Sappington*, 111 Ga. 391, specific performance was granted of such an agreement.

under the New York Stock Corporation Laws. But as the bank was *bona fide*, these payments were not voidable as a preference under the bankruptcy laws. The trustee in bankruptcy brought an action to recover these payments from the bank. *Held*, that he cannot recover. *Irish v. Citizens Trust Co.*, 163 Fed. 880 (Dist. Ct., N. D. N. Y., Aug., 1908).

If the checks had not been given, the deposit would have been subject to a banker's lien, which is not the technical lien, but a mere right of set-off as to any matured debt due the bank. *Bank v. Brewing Co.*, 50 Oh. St. 151. Under the bankruptcy laws, the bank could have set off any matured debt, even against deposits made within four months of bankruptcy. *New York County Nat'l Bank v. Massey*, 192 U. S. 138. The deposit of money in a bank creates the relation of debtor and creditor, so the effect of the checks given was to decrease the obligation of the bank to the depositor. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252. See *Bank v. Brewing Co.*, *supra*. But the trustee, having elected to treat these checks as void, the obligation of the bank to the depositor revived and the notes remained unpaid. And no preference existed to prevent the bank from setting up as against the trustee any claim it might possess against the depositor. The bank's right of setting off against the notes was, therefore, properly held to defeat the trustee.

BANKS AND BANKING — DEPOSITS — EFFECT OF FAILURE OF DEPOSITOR TO NOTIFY BANK OF FORGERIES. — A depositor discovered that his bank had paid and charged to his account forged checks. He failed to notify the bank promptly of the forgeries. *Held*, that he cannot recover from the bank, irrespective of whether it could have protected itself had it been promptly notified. *McNeely Co. v. Bank of North America*, 70 Atl. 891 (Pa.).

A depositor is not chargeable with any payments by his bank except such as are made in conformity with his orders. *Shipman v. State Bank*, 126 N. Y. 318. But he owes to the bank the duty of examining returned vouchers and reporting forgeries. *First Nat. Bank v. Allen*, 100 Ala. 476. *A fortiori* is it his duty to give prompt notice when he knows of the forgeries. *Dana v. Nat. Bank of the Republic*, 132 Mass. 156. The question, then, is whether a depositor who fails in this duty is estopped from claiming from the bank the amounts wrongly paid. Forbearance to exercise a right in reliance on the wrongful act of another is sufficient basis for an estoppel. *Voorhis v. Olmstead*, 66 N. Y. 113. The right to seek restoration from a forger is, in itself, a valuable one, and the depositor should be barred if it appears that owing to his wrongful acts the bank omitted to exercise that right promptly or effectively. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96. The law assumes that had notice been given promptly, steps might have been taken to protect the bank. See *United Security, etc., Co. v. Central Nat. Bank*, 185 Pa. 596. The present case seems to fall directly within this reasoning.

CANCELLATION OF INSTRUMENTS — DEEDS: RESTORATION IN STATU QUO. — The plaintiff filed a bill for the cancellation of a deed to the defendant, which the defendant by duress had induced her to execute and deliver before her marriage to him. The defendant contended that, as the marriage was the sole consideration for the deed, restoration *in statu quo* was impossible, and that therefore the bill must fail. *Held*, that in spite of the plaintiff's inability to make any restoration, the court may order the deed cancelled. *Ring v. Ring*, 127 N. Y. App. Div. 411.

On the broad ground that he who seeks equity must do equity, it is the general rule that a party seeking to rescind a contract must restore the other party *in statu quo*. *Felt v. Bell*, 205 Ill. 213. But since the object of the rule is to do justice, it must not be carried too far: substantial restoration is all that should be required. *Mather v. Barnes*, 146 Fed. 1000, 1019. Even this will not be necessary where the wrongdoer by his own act has made impossible more than a partial restoration; for then all that can in fairness be asked is restoration to the extent of the plaintiff's ability. *Butler v. Prentiss*, 158 N. Y. 49. It follows logically, and as a final limitation of the doctrine of restoration, that if the wrongdoer has complicated matters so that no restoration at all is possible,

owing to the nature of the consideration, equitable relief should nevertheless be granted. Within this limitation the present case directly falls.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COMMITMENT OF DEFENDANT ACQUITTED BECAUSE OF INSANITY. — A defendant was acquitted of a charge of homicide because of insanity. Under a statutory provision the court thereupon committed him to an asylum. He applied for a discharge under a writ of *habeas corpus*. The superintendent of the asylum had adjudged him still insane. *Held*, that the writ be dismissed. *People ex rel. v. Baker*, 59 N. Y. Misc. 359 (Sup. Ct.). See NOTES, p. 218.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL, AND RELIGIOUS — STATUTE COMPELLING COLOR LINE IN PRIVATE SCHOOLS. — A statute made it unlawful for any person, corporation, or association of persons, to maintain a school where persons of the white and negro races were taught. A domestic corporation was convicted under the statute. *Held*, that the defendant corporation has been deprived of no right guaranteed by the federal Constitution. *Berea College v. The Commonwealth of Kentucky*, U. S. Sup. Ct., Nov. 9, 1908. See NOTES, p. 217.

CONSTITUTIONAL LAW — POLICE POWER — PROHIBITION OF POSSESSION OF GAME DURING CLOSED SEASON. — A New York statute makes possession of grouse or plover during the closed season a misdemeanor, whether the birds were taken within or without the state. The relator was arrested for having in his possession grouse and plover taken in Russia and England, and the court refused to release him on *habeas corpus*. He appealed, alleging as error that the statute is unconstitutional in that it takes property without due process and is an unjustifiable interference with interstate and foreign commerce. *Held*, that the statute is a legitimate exercise of the police power, and is not invalidated by the fact that it may indirectly interfere with interstate and foreign commerce. *State of New York v. Hesterberg*, U. S. Sup. Ct., Nov. 2, 1908.

For a discussion of the principles involved, see 17 HARV. L. REV. 418.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — A resident alien attempted to return after a temporary absence from the United States. Under the Immigration Act of 1903, he was excluded on the ground that he was afflicted with a dangerous disease. He brought a writ of *habeas corpus*, contending that the act does not apply to aliens formerly domiciled in this country. *Held*, that the act does so apply. *In the Matter of Hermine Crawford alias Marie Mayvis*, 40 N. Y. L. J. 419 (Dist. Ct. N. Y., Oct. 28, 1908). See NOTES, p. 221.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — REFUSAL TO TESTIFY BEFORE COMMISSIONER IN DEPORTATION PROCEEDINGS. — In deportation proceedings against a Chinese a commissioner ordered him to testify as a witness in the case. He refused so to testify. *Held*, that he is guilty of contempt of the district court which appointed the commissioner. *Tom Wah v. United States*, 163 Fed. 1008 (C. C. A., Second Circ.).

Aliens have no right to enter or remain in the United States. *Fong Yue Ting v. United States*, 149 U. S. 698. Their removal is, then, not punishment; and deportation proceedings are not criminal. *United States v. Hing Quong Chow*, 53 Fed. 233. Accordingly, a statute imposing on an alien the burden of proving his right to be in the United States has been upheld as establishing a rule of civil evidence. *In re Sing Lee*, 54 Fed. 334. And a statement by a Chinese that he entered the country unlawfully is not a confession of crime. *United States v. Hung Chang*, 134 Fed. 19. The court seems, therefore, clearly right in holding that the appellant here was not a party to a criminal suit and so had no constitutional right to refuse to testify. *United States v. Hung Chang*, *supra*. To render proceedings before a commissioner effective there must be some way of punishing one who thus wrongfully refuses to testify. It is well settled that the commissioner cannot punish for contempt. *In re Perkins*, 100 Fed. 950. The principal case, the first

square decision on the point, logically bridges the gap by holding that disobedience of the commissioner's orders is contempt of the court appointing him and is punishable as such. See *United States v. Beavers*, 125 Fed. 778.

CONTRACTS — CONSIDERATION — PROMISEE A STRANGER TO THE CONSIDERATION. — At the request of his father, and in consideration of advances from him, the defendant executed a writing promising the plaintiff to pay her an annuity. *Held*, that the defendant is liable to the plaintiff. *Hamilton v. Hamilton*, 112 N. Y. Supp. 10 (App. Div.). See NOTES, p. 223.

COPYRIGHT — INFRINGEMENT — EFFECT OF RESTRICTIVE NOTICE IN BOOK. — The owners of a copyright published a book in which there was printed a notice that any sale at retail for less than one dollar would be treated as an infringement of the copyright. The defendant bought with notice from a wholesale dealer, who was under no agreement to enforce the terms of the notice, and resold at less than one dollar. *Held*, that there is no infringement under the copyright statute. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339.

By statute authors may secure for a limited time "the sole right of printing, publishing, and . . . vending" their writings. U. S. COMP. ST., § 4952. But the owner of a copyright has power to control sales only so long as he owns the particular copies involved. *Henry Bill Publishing Co. v. Smythe*, 27 Fed. 914. If title passes, the owner cannot restrain future sales in spite of any restrictive agreement, but has only an action on the contract. *Harrison v. Maynard*, 61 Fed. 689. Under similar statutes protecting patents, a sale with a restrictive notice has been held to pass only a qualified title. *The Button Fastener Case*, 77 Fed. 288. But copyright statutes are intended to protect not so much the physical thing created as the right of multiplying copies. See *American Tobacco Co. v. Werckmeister*, 207 U. S. 284. And the courts seem to think that an author realizes sufficiently on the product of his labor when he is allowed the benefits of a first sale. *Wheaton v. Peters*, 8 Pet. (U. S.) 591. Accordingly, they refuse to construe the statute as giving the right to control future sales, and hold that title passes unrestricted in spite of the notice.

CORPORATIONS — DISSOLUTION — OUTSTANDING CERTIFICATES. — The defendant, in consideration of the transfer of stock in the A corporation, agreed to pay the holders of preferred stock certain dividends "so long as the certificates are outstanding." The A corporation was later dissolved by vote of the defendant, as majority stockholder, and a decree for the distribution of its assets was issued. The plaintiff, a preferred stockholder, did not present his certificate under this decree, but sued the defendant on his agreement. *Held*, that he cannot recover. *Bijus v. Standard Distilling & Distributing Co.*, 70 Atl. 934 (N. J., Ct. Ch.).

A stock certificate is simply evidence of the holder's right to a given share in the management, profits, and ultimate assets of the corporation. *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599. Upon dissolution the certificates represent the resulting equitable rights of the stockholders to their several distributive shares in the corporate funds. *James v. Woodruff*, 10 Paige (N. Y.) 541. And these shares are determined by the decree of dissolution, upon which the certificates are merely evidence of a right to receive certain definite sums under that decree. The court therefore seems justified in holding that these certificates are no longer outstanding within the meaning of the agreement. Hence the contract is by its express terms at an end. Where a corporation makes an employment or other continuing contract for a given number of years there may be a condition implied in fact not to dissolve within that period. *Inchbald v. Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733; *Seipel v. Internat'l Life Ins. Co.*, 84 Pa. 47. But in the present case the defendant's liability is expressly made dependent upon the certificates remaining outstanding, and the court seems correct in refusing to imply an obligation in law not to terminate such liability by voting for dissolution.

CORPORATIONS — TORTS AND CRIMES — WHETHER CHARITABLE CORPORATION LIABLE FOR NEGLIGENCE OF AGENT. — Through the negligence of

the ambulance driver of the defendant, a charitable corporation, the plaintiff was run over and injured. *Held*, that the defendant is liable in damages. *Kellogg v. Church Charity Foundation*, 112 N. Y. Supp. 566.

It is generally stated as a rule of law that a charitable corporation is not liable for the torts of its agents unless there has been negligence in their selection. *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432. In nearly all the cases, however, the so-called agents were physicians or nurses over whom the institution had no real control. In such cases the doctrine of *respondent superior* does not apply; hence the exemption of the corporation is easily explained. *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365. Even where the relation of master and servant exists it might be that no beneficiary of a charity should be permitted to complain of negligence in its administration, and at least one case has so held. *Powers v. Mass. Homeopathic Hospital*, 101 Fed. 896. But this ground of non-liability cannot prevail against strangers. *Bruce v. Central M. E. Church*, 147 Mich. 230. The court in refusing to exempt a charitable corporation for the tort of its servant against a stranger is distinctly logical. And since the liability is incurred in fulfilling the purposes of the trust, it cannot be objected that there is a diversion of the trust funds. *Glavin v. R. I. Hospital*, 12 R. I. 411. A recent case denying liability may be distinguished on the ground that in it the servant of the institution was performing a government function. *Noble v. Hahneman Hospital of Rochester*, 112 N. Y. App. Div. 663.

DAMAGES — MEASURE OF DAMAGES — PRIMA FACIE RULE IN ADVERTISING CONTRACT. — The defendant agreed to pay a certain sum for the publication of an advertisement in the plaintiff's periodical for one year. After the plaintiff had prepared the advertisement for printing, the defendant repudiated the contract. *Held*, that the contract price is the measure of damages, unless the defendant shows the amount that should be deducted by reason of the repudiation. *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 192 N. Y. 439.

The object of damages for breach of contract is to place the plaintiff in a situation as good as if the contract had been performed. See *Robinson v. Harman*, 1 Exch. 850. Accordingly, when performance by the plaintiff would involve outlay or expense, he recovers merely the difference between the contract price and the estimated cost of performance. *Singleton v. Wilson*, 85 Tenn. 344. And if performance would ordinarily cause expense, there should be no presumption that the contract price is the measure of damages. But if performance would not ordinarily cause expense, the contract price is *prima facie* the measure of damages, and the burden is on the defendant to show any reduction. Contracts for personal service belong to the latter class. *Howard v. Daly*, 61 N. Y. 362; *Pond v. Wyman*, 15 Mo. 175. The class also includes contracts where performance would originally have involved expense, but where the expense has already been incurred, so that completion of performance requires no further expenditure. *Wood v. Schettler*, 23 Wis. 501. In the principal case, whether the expense of performance is regarded as so small as to be negligible, or as already incurred by preparations for printing, the contract price is *prima facie* the measure of damages. *Peck & Co. v. Kansas City, etc., Co.*, 96 Mo. App. 212.

DOMICILE — PERSONS UNDER DISABILITY. — A guardian was appointed over X's person and property because of insanity. X, with his guardian's consent, removed to another state, where he took up his residence, *animus manendi*. *Held*, that X is domiciled in that state. *In re Kingsley*, 160 Fed. 275 (Dist Ct., Vt.). See NOTES, p. 220.

ELECTIONS — DISFRANCHISEMENT: EFFECT OF SENTENCE SUSPENDED. — The New York Constitution provides that a person convicted of an infamous crime shall be disfranchised. A was found guilty of burglary, but sentence was suspended. *Held*, that he is not disfranchised. *People v. Fabian*, 192 N. Y. 444.

Where a conviction involves, as a consequence, disabilities, disqualification, or forfeitures, courts will, as a rule, enlarge the ordinary meaning of the word "con-

viction" so as to include judgment or sentence. This rule of construction has been applied where conviction disqualifies a witness either at common law or by statute, and where a person is disqualified by conviction to hold a seat in the legislature. *Lee v. Gansel*, Cowp. 1; *Commonwealth v. Gorham*, 99 Mass. 420; *Case of Falmouth*, Mass. Election Cases, 1853 ed., 203. The rule is also invoked where a conviction for violating its conditions forfeits a liquor dealer's license. *Commonwealth v. Kiley*, 150 Mass. 325. Cf. *Schiffer v. Pruden*, 64 N. Y. 47. Furthermore, it is usually held that no appeal lies from a verdict with sentence suspended, and in New York, at least, it is doubtful whether the governor has power to pardon in such a case. See *People v. Markham*, 114 N. Y., App. Div. 387; N. Y. CONST., art. IV., § 5. Hence the result of suspending sentence, a proceeding intended to benefit a defendant, would be to deprive him of a chance to regain rights of citizenship by an appeal or by seeking a pardon. These consequences of the narrow interpretation of "conviction" afford strong reason for presuming that the word was here used in the broader sense.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — PRINCIPAL AND SURETY. — A contracted with B to pay the judgment in a suit in a state court by B against C if judgment was rendered against C. The court gave judgment against C. B and C were citizens of the same state, and A was a citizen of another state. A brought a bill in the federal court to have the judgment avoided for fraud, and C was made a defendant to give jurisdiction by diversity of citizenship. *Held*, that the federal court has no jurisdiction. *Steele v. Culver*, U. S. Sup. Ct., Oct. 26, 1908.

For the federal courts to have jurisdiction by diversity of citizenship all the parties plaintiff must be citizens of different states from all the parties defendant. *Gage v. Riverside Trust Co.*, 156 Fed. 1002. Such jurisdiction is not affected by merely formal or unnecessary parties. *Reese v. Zinn*, 103 Fed. 97. But necessary parties must be aligned as plaintiffs or defendants according to their real interests and the facts of the case. *Gage v. Riverside Trust Co.*, *supra*. And a party whose real interest places him on one side cannot be transferred to the other in order to give jurisdiction by diversity of citizenship. *Munn v. Gaddie*, 158 Fed. 42. And, when a suit is brought by one in a representative or fiduciary capacity, the jurisdiction of the federal courts depends upon his citizenship, and not upon the citizenship of the person represented or interested. *Bonnafee v. Williams*, 3 How. (U. S.) 574. It seems settled that, where the action is to have a judgment set aside, the jurisdiction depends on the citizenship of the person against whom the judgment was rendered, and not on the citizenship of the person moving to have it set aside. *King v. Davis*, 137 Fed. 198.

INSURANCE — PREMIUMS — RECOVERY BACK BY POLICY HOLDER AFTER POLICY ANNULLED. — During the life of a title insurance policy the insurer went into a receivership, and the policy was annulled. The insured sued for the amount of a premium paid. *Held*, that the company is entitled to deduct the value of insurance given during the time elapsed between the date of the policy and the date of its annulment. *State ex rel. Schaefer v. Minn. Tit. Ins. Co.*, 116 N. W. 944 (Minn.).

For a discussion of a policy holder's right to receive premiums paid on a termination of the contract of insurance in the case of life insurance, see 22 HARV. L. REV. 134.

LEGITIMACY — PUTATIVE MARRIAGE. — Parents domiciled in Scotland or Canada went through a marriage ceremony in California, honestly believing in the validity of a divorce which a former husband had obtained in North Dakota upon substantive and jurisdictional grounds not recognized in England, Canada, or Scotland. *Held*, that the parents' mistake having been one of law, not fact, the doctrine of putative marriage does not apply. *Re Stirling*, [1908] 2 Ch. 344. See NOTES, p. 222.

MALICIOUS PROSECUTION — BASIS AND REQUISITES OF ACTION — WRONGFUL INSTITUTION OF PATENT INTERFERENCE PROCEEDINGS. — The defend-

ant maliciously instituted and prosecuted interference proceedings in the patent office, thereby delaying the issuance of a patent to the complainant, the prior applicant. *Held*, that the complainant has no right of action for damages. *Avery & Son v. Case Plow Works*, 163 Fed. Rep. 842 (Circ. Ct., E. D. Wis., July, 1908).

In most jurisdictions of the United States an action for the malicious prosecution of a civil action will lie irrespective of arrest, attachment, or special damage. *Closson v. Staples*, 42 Vt. 209. *Contra*, *Smith v. Michigan Buggy Co.*, 175 Ill. 619. It is universally agreed, however, that the action will lie when there has been special damage other than that involved in defending the suit. See *Smith v. Michigan Buggy Co.*, *supra*. As it does not clearly appear that the plaintiff in the principal case alleged that he had been sued without probable cause, the decision may be supported. But assuming such an averment, the plaintiff according to the Vermont decision should have prevailed. And, it is submitted, the same result should follow even under the Illinois rule. For under the patent statutes an unpatented invention vests in the discoverer an inchoate right to its exclusive use. *Evans v. Weiss*, 2 Wash. (U. S.) 342. This is a property right which may be sold or assigned. *Burton v. Burton Stock Car Co.*, 171 Mass. 437. And the inventor is entitled to perfect the right by patent. *Gayler v. Wilder*, 10 How. (U. S.) 477. Therefore the defendant, by delaying the perfection of the plaintiff's right, must necessarily have caused special damage which should entitle the plaintiff to recover.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — SALE BY MORTGAGOR: RELEASE OF PART OF MORTGAGED PREMISES. — A bought part of a mortgaged tract of land. The rest of the land was then sold to B. The mortgagee, without knowledge of the sale to A, released from the mortgage lien the part sold to B. The value of B's land was equal to the amount of the mortgage. A filed a bill in equity praying that his land be released from the mortgage lien. *Held*, that he is not entitled to such relief. *Schofield v. Wallace*, 39 Pittsb. Leg. J. 41 (C. P., Allegheny Co., Pa., Aug. 1908).

As between purchasers of parts of mortgaged premises, their holdings are subjected to the satisfaction of the mortgage in the inverse order of their alienation. *Savings Bank v. Creswell*, 100 U. S. 630. It follows that if the mortgagee, with knowledge of previous alienations, releases from the mortgage lien portions subsequently alienated, which are of sufficient value to discharge the mortgage debt, those previously alienated are released from the mortgage lien. *Schrack v. Schriener*, 100 Pa. 451. But this rule of charging the lands in the inverse order of their alienation is a rule of equity, and as such should not be applied when it would cause hardship. It is not fair to put upon the mortgagee the duty of keeping himself informed of all conveyances of portions of the land and of the resulting equities claimed by the owners. But any alienee, who intends to claim an equity, should see to it that the mortgagee has notice of the alienation. *Stuyvesant v. Howe*, 1 Sandf. Ch. (N. Y.) 419. The plaintiff in the present case not having given such notice was rightly denied equitable relief.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — REQUIREMENT OF BANK DEPOSITORS' GUARANTY FUND. — A statute, passed after the incorporation of the plaintiff, provided that every state bank should pay an annual assessment equal to 1 % of its deposits for the purpose of creating a common guaranty fund for depositors. *Held*, that the statute is constitutional. *Noble State Bank v. Haskell*, 97 Pac. 590 (Okla.).

The statute does not impair the obligation of contracts, for before incorporating the bank the legislature had reserved the right to alter all corporate charters. *Wilson*, Rev. & Ann. St. Okla., 1903, c. 18, § 3; Okla. Const., Art. IX. § 47. See *Railroad Co. v. Maine*, 96 U. S. 499. Even without such reservation, a reasonable exercise of the police power does not come within the inhibition against impairing the obligation of contracts or conflict with other constitutional provisions. *Cummings v. Spaunhorst*, 5 Mo. App. 21. The nature of banking makes it especially a subject for regulation by the police power. Thus,

a state may constitutionally restrain unsound banks from doing business, or may require a deposit of securities for the safety of note holders or depositors. *Commonwealth v. Farmers & Mechanics Bank*, 21 Pick. (Mass). 542; *Medill v. Collier*, 16 Oh. St. 599. The Oklahoma statute, however, merges the required deposit into a common fund for the security of depositors in any insolvent bank; so it may be objected that a bank which remains solvent is unjustly deprived of property. The answer is that both strong and weak banks may become insolvent, and all insolvent banks will receive equal treatment in respect to the common fund. See *State v. Richcreek*, 167 Ind. 217. The constitutionality of early statutes requiring a common guaranty fund seems to have been accepted without question. See *Elwood v. Vermont*, 23 Vt. 701.

PROFITS A PRENDRE—**PROFIT APPURTENANT CLAIMED WITHOUT STINT**.—In defense to an action of trespass on a non-tidal stream belonging to the plaintiff, the defendant claimed a right from time immemorial, vested in the tenants of a certain manor, to fish on the property without stint and for commercial purposes. *Held*, that the court will not presume a grant of such a right. *Lord Chesterfield v. Harris*, [1908] 2 Ch. 397.

A profit *à prendre* may be appurtenant to land. *Huntington v. Asher*, 96 N. Y. 604. Or it may be held in gross, so as to be assignable. *Welcome v. Upton*, 6 M. & W. 536. And, so it would seem, may a use without stint. See *Bailey v. Stevens*, 12 C. B. (N. S.) 91. But it is doubtful whether an easement in gross may be required. *Mayor, etc., of New York v. Law*, 125 N. Y. 380. *Contra, Rangeley v. Midland Railway Co.*, L. R. 3 Ch. 306. It follows that an easement not connected with the use of the dominant tenement cannot pass with that tenement. *Ackroyd v. Smith*, 10 C. B. 164. Such an easement would be an anomaly; for it would be in effect personal and yet treated as appurtenant to land. This same reasoning, applied to the present case, shows the ground for refusing to uphold a use claimed as appurtenant which is without stint and therefore unlimited by the dominant estate. Even though an easement may be held in gross it must be claimed as in a man and his ancestors, not as annexed to land. For if a right is claimed as annexed to land it must be measured by the size and want of the estate to which it is appurtenant. See 2 Bl. Com. 265.

PUBLIC OFFICERS—**RESIGNATION**—**WITHDRAWAL OF RESIGNATION**.—A sheriff tendered his resignation to the board of county commissioners to take effect at a designated future day. The commissioners accepted it. *Held*, that the sheriff may, nevertheless, withdraw the resignation before the day appointed. *Ryan v. Murphy*, 97 Pac. 391 (Nev.).

For a discussion of the principles involved, see 19 HARV. L. REV. 304.

RESTRAINT OF TRADE—**SHERMAN ANTI-TRUST LAW**—**AMERICAN TOBACCO COMPANY'S CASE**.—The defendants were engaged in buying raw material, manufacturing, and selling the product beyond their state lines. Each owned many factories outright and controlled many through stock ownership, and they were together under affiliated managements. *Held*, that each defendant is a combination in restraint of trade under § 1 of the Sherman Act. *U. S. v. American Tobacco Co.*, 40 N. Y. L. J. 691 (C. C. A., S. D. N. Y., Nov. 7, 1908). See NOTES, p. 216.

RIGHT OF PRIVACY—**CONSTITUTIONALITY OF STATUTE FORBIDDING UNAUTHORIZED USE OF NAME OR PORTRAIT FOR ADVERTISING PURPOSES**.—A statute gave to a person whose name or portrait was used by another for advertising or trade purposes, without written consent, an equitable action to restrain such use, authorized an award of exemplary damages against the defendant if he shall have knowingly used the name or portrait in the manner declared unlawful by the act; and made such use of another's name or portrait a misdemeanor. *Held*, that the statute is not unconstitutional. *Rhodes v. The Sperry & Hutchinson Co.*, 40 N. Y. L. J. 494 (N. Y., Ct. App., Oct. 23, 1908).

This statute was directly aimed at a much criticized decision of the New York court which denied any remedy in such cases. *Roberson v. Rochester, etc., Co.*,

171 N. Y. 538. For a discussion of that case, see 15 HARV. L. REV. 227; 16 HARV. L. REV. 72. For a discussion of the general principles of the right of privacy, see 4 HARV. L. REV. 193-220 18 HARV. L. REV. 625; 21 HARV. L. REV. 63.

SALES — BILL OF LADING — LIABILITY OF ASSIGNEE FOR VENDOR'S BREACH OF CONTRACT. — A vendor shipped cotton under a contract warranting its quality. He took an order bill of lading, attached to it a draft on the vendee, and sold the draft to the A bank. The vendee paid the draft and obtained the bill of lading. Later he sued the bank for a breach of the warranty of quality. *Held*, that he cannot recover. *Mason v. Nelson*, 62 S. E. 625 (N. C.).

This case overrules a previous decision in the same jurisdiction which was criticized in 14 HARV. L. REV. 159. For a discussion of similar cases, see 16 HARV. L. REV. 292.

STATUTE OF FRAUDS — SALES OF GOODS, WARES, AND MERCHANDISE — GOODS ALREADY IN POSSESSION OF VENDEE. — The defendant, having in his possession certain mill culls belonging to the plaintiff, made an oral contract to buy them. The defendant kept silence for five days and then repudiated the contract. *Held*, that the plaintiff cannot recover on the contract. *Godkin v. Weber*, 117 N. W. 628 (Mich.).

The mere fact that the vendee is already in possession of goods does not constitute an acceptance and receipt which will take a contract of sale out of the seventeenth section of the Statute of Frauds. *Silkman Lumber Co. v. Hunholz*, 132 Wis. 610. There must be in addition some conduct making the buyer's possession inconsistent with anything but ownership. *Matter of Hoover*, 33 Hun (N. Y.) 553. Whether such conduct is shown is a question of fact for the jury. *Dorrey v. Pike*, 50 Hun (N. Y.) 534. But the evidence must be clear and unequivocal. *Lillywhite v. Devereux*, 15 M. & W. 285. The courts have gone far in holding that there is no evidence. See *Matter of Hoover*, *supra*. In the present case retention of the goods for five days before repudiation of the contract is held to be no evidence. Where the vendor has delivered possession to the vendee after the contract, retention is evidence of acceptance, for the vendee has no right to retain unless in pursuance of the agreement. *Gilliat v. Roberts*, 19 L. J. Ex. 410. But where the vendee had possession before the contract, his possession afterwards is not inconsistent with the former relation of the parties.

TAXATION — PROPERTY SUBJECT TO TAXATION — WATER POWER. — A owned land in Massachusetts on which water power was generated and controlled to work his mill in Rhode Island. The water power was assessed for taxation in Massachusetts, and A petitioned to abate this tax on the ground that the water power was not taxable in Massachusetts. *Held*, that he is not entitled to any abatement. *Blackstone Mfg. Co. v. Town of Blackstone*, 85 N. E. 880 (Mass.).

As a general rule realty is taxed where it is situated. See *Potter v. Orange*, 62 N. J. L. 192. An apparent though not a real exception exists in the taxation of water power. Thus, an owner of land may be taxed on his use of water power which is generated on other land without the taxing jurisdiction. *Matter of Hall*, 116 N. Y. App. Div. 729. And the same water power is also taxed where generated although applied elsewhere. *Winnipiseogee, etc., Mfg. Co. v. Gilford*, 64 N. H. 337. In the first case the use of the water power is an element of value in the assessment of the property taxed, as in any other easement. In the second case the capacity of the land to render other land more valuable by providing water power is obviously to be considered in its taxation. See *Quinebaug Reservoir Co. v. Union*, 73 Conn. 294. In each case the value of the realty is enhanced by connection with the water power, and the realty is therefore taxed at a higher rate. See *Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562. Thus, although the water power is a distinct element in assessment for taxation it is not a distinct subject of taxation. Decisions opposed to the main case have overlooked this distinction. *Union Water Power Co. v. City of Auburn*, 90 Me. 60.

TORTS — IN GENERAL — NON-NATURAL USE OF LAND WITHOUT NEGLIGENCE. — A tramway company paved its roadway with creosoted wood, the fumes of which injured the plants and shrubs of the plaintiff, a market gardener. The company was not guilty of negligence, and it did not know that the creosote might cause damage on the adjoining land. There was no finding that the use of creosote was likely to cause damage. *Held*, that the plaintiff may recover for the damage suffered. *West v. Bristol Tramways Co.*, 99 L. T. R. 264 (Eng., Ct. App., March, 1908).

It has been held in England that "a person who brings upon his land anything likely to do mischief if it escapes is *prima facie* answerable for all the damage which is the natural consequence of its escape." *Rylands v. Fletcher*, L. R. 3 H. L. 330. This extraordinary liability does not extend to everything brought on the land, but only to such things as are likely to do damage. It would seem to follow that the plaintiff must allege that the thing brought upon the land was likely to do damage if it escaped. If that is true, the burden of proving the truth of the allegation must be on the plaintiff. But the principal case puts the burden of proof on the defendant. It is submitted that this case marks a material extension of the doctrine of *Fletcher v. Rylands*, and that it is unjustifiable both on principle and in the light of subsequent cases limiting that doctrine. *Nichols v. Marsland*, L. R. 10 Exch. 255; *Box v. Jubb*, 4 Ex. D. 76. In this country the doctrine in any form has never been regarded with favor.

TRADE UNIONS — STRIKES — RIGHT TO SECURE CONCERTED ACTION BY IMPOSITION OF FINES ON MEMBERS. — The defendant unions ordered a strike against the plaintiff to enforce a demand for higher wages and a shorter day. To induce their members to obey this order, the unions threatened to fine them if they continued to work. The fines were to be levied in accordance with the by-laws of the unions. *Held*, that the defendants be enjoined from this method of intimidation. (Two judges dissenting.) *Willcutt & Sons Co. v. Bricklayers' Benevolent and Protective Union*, 85 N. E. 897 (Mass.).

This decision follows a previous ruling by the same court. *Martell v. White*, 185 Mass. 255. And it is in accordance with what is believed to be the better view. *Boutwell v. Marr*, 71 Vt. 1. See 17 HARV. L. REV. 558; 20 *ibid.* 355, 356. That the person intimidated has voluntarily joined the union and agreed that a fine may be imposed upon him does not prevent the enforcement of such a penalty from being as against some third person an unlawful method of coercion. Nor can it justify conduct otherwise unlawful. *Boutwell v. Marr*, *supra*. See *Booth v. Burgess*, 65 Atl. 226-233. It is not the interest of the members in their own freedom to deal with the employer, but his right that no improper means shall be used to restrain them from contracting with him, which the court is asked to protect. The situation is essentially the same as where a trade union or other voluntary association secures concert of action among outsiders by means of threats or intimidation. And that such a method of procedure is unlawful is well settled. *Barr v. Essex Trades Council*, 53 N. J. Eq. 101.

VESTED, CONTINGENT AND FUTURE INTERESTS — ESTOPPEL BY DEED: PRIVY OF HEIR. — A testator devised land to A for life, to the children of A after her death, and, if A died without leaving children surviving her, to B and his heirs. A had one daughter who died during the mother's life. B died before A, leaving C and X his heirs. C, during the life of A, purported to convey the land to D with warranty. Both C and X died before the death of A. *Held*, that the will leaves a contingent remainder to B and his heirs, that nothing passes to D by the deed from C, and that the heirs of C are not estopped by the deed from claiming their interest in the land as against D. *Golladay v. Knock*, 85 N. E. 649 (Ill.).

At common law a deed which purports to convey a contingent remainder takes effect, if at all, only by way of estoppel. *Stewart v. Neely*, 139 Pa. 309. Whether the heirs of C in the principal cases are estopped by his deed from setting up their title against D depends on whether they take by descent in

privity with C or by purchase without such privity. For estoppel by deed affects privies of the grantor. *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528. But it does not affect those not claiming under the grantor. *Kitzmiller v. Van Rensselaer*, 10 Oh. St. 63. Heirs are generally in privity with the ancestor. *Bank of Utica v. Mersereau*, *supra*. But heirs are not in privity with the ancestor if they acquire title otherwise than by descent from him. *Russ v. Alpaugh*, 118 Mass. 369. And a contingent remainder may pass to the heirs of the remainderman, or even to his devisee under the common statutes concerning wills. *Loring v. Arnold*, 15 R. I. 428. Here, however, the court held that the heirs of C took their claim directly under the original will, and not by descent from C, because title never vested in C. *Cf. Hall v. Nute*, 38 N. H. 422; *Schmidt v. Jewett*, 127 N. Y. App. Div. 376.

WITNESSES — COMPETENCY IN GENERAL — TESTIMONY AS TO PERSONAL TRANSACTION WITH DECEDENT. — A New York statute provides that in an action against an executor a party may not be examined as a witness in his own behalf concerning a personal transaction or communication between the witness and the deceased. A sued B's executors on a note alleged to have been executed by B. A, as witness in his own behalf, was asked, "Have you seen B write his name so as to familiarize yourself with his signature?" *Held*, that he is incompetent to answer. *Wilber v. Gillespie*, 127 N. Y. App. Div. 604.

New York courts have been very liberal in construing the words "personal transaction" in this statute. Thus, it has been held that a beneficiary who is contesting a will cannot testify to irrational acts of the testator in his presence. *Holland v. Holland*, 98 N. Y. App. Div. 366. Nor can he testify to a conversation between the testator and a third party at the time the will was executed. *Matter of Bernsee*, 141 N. Y. 389. Such testimony is admissible under similar statutes in other jurisdictions. *Erusha v. Tomash*, 98 Iowa 510; *Wollman v. Ruehle*, 104 Wis. 603. And even the New York courts realized that the rule has been stretched to its extreme, but they defend their decisions as being in furtherance of justice. See *Matter of Will of Dunham*, 121 N. Y. 575. The present decision involves holding that merely seeing a man write his name, in whatever circumstances, is a personal transaction. Even in view of previous holdings, none of which have gone so far, it seems doubtful whether such an absolute departure from the clear meaning of the words is justifiable.

WITNESSES — EXPERTS — COMPENSATION EXCEEDING REGULAR FEE. — The defendant appealed from a conviction of forgery, assigning as error that the court below had sustained a physician, a witness for the defendant, in his refusal to answer a hypothetical question as to the effects of a disease under certain conditions, unless he should receive compensation in excess of the regular witness fee for such expert testimony. *Held*, that the court erred in sustaining the physician's refusal to answer the hypothetical question. *State v. Bell*, 111 S. W. 24 (Mo., Sup. Ct.).

For testimony involving preparation, with a view to pronouncing a deliberate opinion upon particular circumstances of the case, an expert may demand extra compensation. *People v. Montgomery*, 13 Abb. Pr. n. s. (N. Y.) 207. Whether the same privilege should extend to experts called upon simply for impromptu answers to general and hypothetical questions, the cases are not agreed. Recent decisions and the weight of authority, however, are opposed to such an extension. *Main v. Sherman Co.*, 74 Neb. 155. *Contra, United States v. Howe*, 26 Fed. 394. The minority view, which declines to discriminate between the two kinds of expert testimony, although finding no support in recent common law decisions, has in a few states been perpetuated by statute. *Farmer v. Stillwater Water Co.*, 86 Minn. 59. But such a statute does not apply to a witness to whom the facts are already known, merely because he possesses professional skill which may enable him to observe and recount those facts more intelligently. *Anderson v. M., St. P. & S. Ste. Marie Ry. Co.*, 103 Minn. 184. Where, then, experts must give impromptu answers without additional witness fee, a promise to pay such additional fee is unenforceable for lack of consideration. *Burnett v. Freeman*, 125 Mo. App. 683. And in the absence of such a

contract there can be no recovery on the *quantum meruit*. *C. & M. E. R. Co. v. Judge*, 135 Ill. App. 377.

WITNESSES — IMPEACHMENT — EVIDENCE OF BAD CHARACTER OF DEFENDANT IN CRIMINAL CASE. — The defendant in a criminal case testified as to his actions on the day of the crime. The prosecution was then allowed to introduce evidence of the defendant's general bad character. *Held*, that the admission of the evidence is error. *People v. Hinksman*, 85 N. E. 676 (N. Y.).

Evidence of a prisoner's bad character cannot be introduced as tending to show his guilt unless the defense puts character in issue. *State v. Lapage*, 57 N. H. 245. Whether a witness may be impeached by testimony to his bad reputation is a question on which there is an irreconcilable conflict of authority. See *Merriman v. State*, 3 Lea (Tenn.) 393; *Carter v. Cavanaugh*, 1 Greene (Ia.) 171. New York allows such impeachment in the case of ordinary witnesses. *Carlson v. Winterson*, 147 N. Y. 652. It is submitted that on both principle and authority the court should not exclude evidence against a defendant witness which it would admit to impeach an ordinary one. *Lockard v. Commonwealth*, 87 Ky. 201. It is true that evidence of bad character may weigh with the jury in the determination of the prisoner's guilt. But so, in the case of a defendant charged with some form of dishonesty, may evidence of untruthfulness; and the admissibility of such evidence the court concedes. See *State v. Beal*, 68 Ind. 345. The danger should be averted, not by exclusion of the evidence, but by instructions as to its proper function, for it is fundamental that evidence admissible for one purpose is not to be rejected because it may be perverted to another. *State v. Farmer*, 84 Me. 436.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

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- MARITIME SALVAGE AND CHARTERED FREIGHT.** *M. A. Rundell.* A clear outline of the law on the subject. 24 L. Quar. Rev. 385.
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- REASON AND CONSCIENCE IN SIXTEENTH-CENTURY JURISPRUDENCE.** *Paul Vinogradoff.* Discussing the influence of the Canon Law, the importance of "Doctor and Student," and tracing the growth of equity. 24 L. Quar. Rev. 373.
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I. Miscellaneous Enterprises affected with a Public Interest. II. Railroad Companies. *O. H. Myrick.* A summary of the decisions on the questions involved. 67 Cent. L. J. 299, 317.
- REVOCATION OF TREATY PRIVILEGES TO ALIEN-SUBJECTS, THE.** *Thomas Hodgkins.* Showing the peculiar situation as to treaties as regards United States rights in Canadian fisheries. 44 Can. L. J. 633.
- SHERMAN ANTI-TRUST LAW AND THE PROPOSED AMENDMENT THERETO.** *Charles E. Littlefield.* 40 Chi. Leg. N. 373.
- SOME ASPECTS OF THE LAW OF FOREIGN JUDGMENTS, WITH SPECIAL REFERENCE TO DEFAULT JUDGMENTS OF ENGLISH AND COLONIAL COURTS INTER SE.** *C. C. McCaul.* 24 L. Quar. Rev. 412.
- SUPREME COURT OF THE UNITED STATES AND THE ENFORCEMENT OF STATE LAW BY STATE COURTS, THE.** *Henry Schofield.* Arguing that by the Fourteenth Amendment the Supreme Court of the United States has power to review the decisions of state courts on state laws. 3 Ill. L. Rev. 195.
- THEORY OF A PLEADING, THE.** *Clarke Butler Whittier.* Showing that a complaint must proceed on a definite theory. 8 Colum. L. Rev. 523.
- TWO PROBLEMS IN LEGAL HISTORY.** *W. C. Bolland.* Showing when courts recognized qualifications of barristers to appear before them, and origin of the name barrister. 24 L. Quar. Rev. 392.

II. BOOK REVIEWS.

THE VICTORIAN CHANCELLORS. By J. B. Atlay. In two volumes. Vol. II. London: Smith Ellis and Company; Boston: Little, Brown and Company; 1908. pp. xi, 476. 8vo.

The second volume of "The Victorian Chancellors" more than fulfils the promise of the first. See 20 HARV. L. REV. 249. Though perhaps none of the Chancellors whose biographies form the second volume—St. Leonards, Cranworth, Chelmsford, Campbell, Westbury, Cairns, Hatherley, Selborne, Halsbury, and Herschell,—with the possible exceptions of Campbell and Westbury, are as vital human figures as Lyndhurst and Brougham, the interest never for a moment flags. Mr. Atlay possesses what are not always gifts of biographers—a sense of proportion, discrimination, appreciation, and good English style. When to these are added industry, careful research, interest and sympathy, the result is a book that will justly take a high rank among legal biographies.

Mr. Atlay has used, and acknowledges the use of, all the biographies that have been published of the several chancellors. In addition he had access to the correspondence of St. Leonards, and a manuscript autobiography of Chelmsford.

After reading Mr. Atlay's biographies one feels almost a personal acquaintance with the holders of the Great Seal. The erudition of St. Leonards, the good sense and gentle character of Cranworth, the brilliant advocacy and attractive personality of Chelmsford, the power and assertiveness of Campbell, the learning, brilliancy, and instability of Westbury, the political ability and high legal attainments of Cairns, the painstaking care and loyal service of Hatherley, the political and moral integrity and strength of Selborne, all stand forth clearly.

All men of distinction are the subjects or authors of countless anecdotes and

of pithy and brilliant sayings. The Victorian Chancellors are not exceptions and Mr. Atlay has made most happy selections.

An example of Campbell at his best is shown in his estimate of Cranworth: "The new Ministry is formed, and Cranworth is Chancellor. His life must some day be written, and I should delight to do justice to his unsullied honour, his warmth of heart, his intuitive rectitude of feeling, his legal acquirements, his patient industry, and his devoted desire to do his duty." p. 53.

How different a picture do we get of Campbell from the one we have after reading his lives of Lyndhurst and of Brougham; and how well Cranworth has been pictured.

The brilliant wit and caustic tongue of Westbury, though not exercised in bitterness as it often was, is shown in the report of his talk with Sir William Erle after his retirement from the Chief Justiceship of the Pleas. "My dear fellow, why do you not attend the Privy Council?" "Oh, because I am old and deaf and stupid." "But that's no reason at all, for I am old, and Williams is deaf, and Colonsay is stupid, and yet we make an excellent Court of Appeal."

Extracts and selections might be multiplied. But it should suffice to say that the book is one which is well worth possessing.

S. H. E. F.

PROBLEMS OF CITY GOVERNMENT. By L. S. Rowe. New York: D. Appleton and Company. 1908. pp. 358.

The title of this volume affords but little clue to its contents, for the book does not contain any systematic presentation of contemporary municipal problems. On the contrary it is a collection of essays which deal in a more or less elementary way with municipal history, urban sociology, the law of municipal corporations, the framework of city government, and the relation of the municipality to public utilities. These various essays, while somewhat related to one another in matter and method, have apparently been written at different times, and are very uneven in quality and thoroughness.

Two initial chapters sketch in outline the history of municipal development from earliest times to the present day, adding little or nothing to what is already accessible, in convenient form, to the ordinary student of political science. A short general discussion of "The Nature of the Municipal Problem" follows; then come chapters dealing with the social and political consequences of city growth. In his analysis of the legal powers of the municipality, which forms the next topic, the author considers the rules relating to the interpretation of municipal powers, dealing particularly with the scope and limitations of the police power in American cities. The general lines which the courts have followed when called upon to determine the validity of city ordinances are very clearly set forth; likewise the limits within which the municipal authorities may regulate the operations and charges of public service corporations. In this part of the book the discussion is lucid, well arranged, and amply provided with citations to unquestionable authorities in the form of leading cases.

A chapter on "The Organization of the Modern Municipality" is devoted mainly to a criticism of the doctrine of "division of powers" as applied to the framework of city government in the United States, and a plea for greater simplicity in civic organization. Towards the system of government by commission Professor Rowe is inclined to look very hopefully; but in a subsequent discussion of American democratic ideals the desirability of concentrating greater powers in the hands of the mayor is emphasized. This, the author believes, is an almost indispensable preliminary to efficient municipal administration and should be insisted upon even though the policy may contravene the ordinary layman's views of what constitutes democracy in local government. Greater concentration of power and responsibility, less faith in political shibboleths, less manifestation of makeshift compromises in the framework of city government: these are the things for which the writer pleads vigorously and with sound judgment.

Somewhat less than one half the whole volume is devoted to the questions of

municipal ownership and municipal control in their various aspects. Neither of these questions is discussed in any comprehensive way, although a chapter on "The Relation of the City to Public Utilities" contains a good deal of interesting matter, most of which is summarized from the recent report of the National Civic Federation's commission on municipal and private operation of public utilities, of which body the author was a member. A lengthy chapter on the gas service of Philadelphia recapitulates in the main what the author has previously published upon this topic; another deals with municipal ownership and operation of street railways in Germany. This latter, although based upon material which is not in all cases up to date, is extremely useful, owing to the paucity of such discussions in English, and although the author discloses, throughout the volume, an unswerving allegiance to the cause of municipal socialism, his treatment of mooted questions is far from being intemperate or unscientific.

The book is written in very readable style, and on its merits, despite the organic and incidental defects which have been noted, ought to command a considerable circle of interested readers. Short bibliographies are appended to each chapter, but these are, for the most part, too scant to be of any special service.

W. B. M.

AMERICAN LAW. By James De Witt Andrews. Second edition. In two volumes. Chicago: Callaghan and Company. 1908. pp. xxii, 2026. 8vo.

The first edition of this work was the subject of extended review at the time of its publication in 1900. 14 HARV. L. REV. 392. The same general classification of American law has been followed in the new edition. The first chapter, which is an introduction, has been rewritten and considerably cut down. The remainder of Part I (27 chapters) substantially follows the first edition, though through this part as through the entire work new cases have been added. With the beginning of Part II, The Law of Things, expansion of the work begins. Chapter XXIX, Things (or Property), is increased, by addition of new material and fuller discussion, some seventy pages, and Chapter XXX, Things Real, some sixty pages.

The second volume is almost entirely new work. Part III, The Law of Actions, which in the first edition consisted of a single chapter of one hundred and twenty pages, is now expanded to twelve chapters, covering nearly all of the second volume. The relative proportion of subjects is better observed, but to the law of crimes only twenty pages are devoted. About eighty-five hundred cases are cited.

The author has done carefully and thoroughly his work of bringing the book to date and of treating procedure. The limitations of the book are necessarily the limitations of the plan which he has adopted and followed. Yet a demand sufficient to warrant a second edition at this time is proof in itself that the book has proved satisfactory to the profession and has made a place for itself. In its new form it should be more useful than before. The press-work and make-up of the books are excellent, but smaller volumes would be easier to handle.

S. H. E. F.

ELEMENTS OF INTERNATIONAL LAW. By George B. Davis. New York: Harper and Brothers. 1908. pp. xxx, 673. 8vo.

This work is a textbook suitable for use in a college course. The author's treatment of his subject is quite elementary. The footnotes, however, contain fairly elaborate references to original sources, and to practically all the authoritative treatises on international law, and are, therefore, considerably more valuable to the student than is the text. Though this, a third edition, is a revision of the earlier ones in the light of modern developments, the text in several places speaks as of the date of the earlier editions. When the author has occasion to touch on problems in private international law, or more exactly,

conflict of laws, his utterances are frequently loose, and sometimes incorrect, as when he declares that the domicile of a ward is that of its guardian (p. 160). From a literary standpoint the book would be improved by a revision to eliminate sentences of the type of the following: "Children born on the high seas, or while passing through foreign countries, have the legal nationality of their parents" (p. 139). The value of the book is enhanced by an appendix setting forth at length the results of the Second Hague Peace Conference, which the author attended as a delegate.

E. H. G.

A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS. Third Edition. By Thomas Gould Frost. Boston: Little, Brown and Company. 1908. pp. xvi, 909. 8vo.

Mr. Frost's book is divided into three parts. Part I, which is reprinted from the first edition without change, is devoted to a study of general incorporation law, with a large number of cases cited. Though the scheme of the treatment of the subject is to take up in order the steps of organizing corporations, the author has permitted himself frequent excursions into general corporation law where the immediate step in hand forms an easy entrance into such discussion. This adds to the value of the work and makes it a treatise rather than a manual. Part II is a careful digest of the incorporation acts of the various states, well annotated. Part III contains a large number of forms and precedents, covering all the necessary steps for organization of corporations. The work will be a useful addition to the library of the incorporation specialist, and should be welcomed by the general practitioner.

E. R. B.

THE MYSTERY OF THE PINCKNEY DRAUGHT. By Charles C. Nott. New York: The Century Company. 1908. pp. 334. 12mo.

THE LAW OF FRAUDULENT AND VOLUNTARY CONVEYANCES. By H. W. May. Third edition. By W. Douglas Edwards. London: Stevens and Haynes. 1908. pp. lxi, 516. 8vo.

A TREATISE ON THE MODERN LAW OF CORPORATIONS. By Arthur W. Machen, Jr. In two volumes. Boston: Little, Brown and Company. 1908. pp. ccxxv, 816; iv, 817-1798. 8vo.

THE CONTROL OF PUBLIC UTILITIES. By William M. Ivins and Herbert Delavan Mason. New York: Baker, Voorhis and Company. 1908. pp. lxxvii, 1149.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury. Volume III. Philadelphia: Cromarty Law Book Company; London: Butterworth and Company; Rochester: Lawyer's Coöperative Publishing Company. 1908. pp. cxxxi, 578. 8vo.

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THE SCIENCE OF JURISPRUDENCE.

IN his preface to Thucydides Hobbes tells us that "They be farre more in number, that love to read of great Armies, bloudy Battels, and many thousands slaine at once, than that minde the Art, by which the Affaires, both of Armies, and Cities, be conducted to their ends." In that quaint and pedantic way one of the masters of the Science of Politics has attempted to emphasize its overshadowing importance. The expounders of that science, of which Jurisprudence is only a distinct and important branch, are divided into two schools whose methods of investigation and demonstration are radically different from each other. To a student of the older or Analytical School¹ a constitution, a code of laws or customs, present themselves as things that have existed from the very beginning in their present form. His primary duty therefore involves only such an analysis of their various provisions as will reveal the existing rules under which rights and duties are defined and remedies administered. With the history of the processes through which such constitutions or codes came into existence he has nothing directly to do; in his view the history of law is really no part of Jurisprudence; it is simply a side light which may or may not be used as an aid to interpretation. Putting aside the teachings of history, except such as are permanent in nature, and rejecting the fact that political and legal institutions can best be studied, not as arbitrary or imaginary combinations, but rather as

¹ It should be said, however, that the Analytical School is divided into two branches: the one beginning with the investigation of the abstract ideas of right and law in their relation to morality, freedom, and the human will generally; the other beginning with the actual facts of law as they now appear, when metaphysics and ethics are excluded from view. The difference, in a general way, is that which divides German expounders of *Naturrecht* from the Benthamites.

belonging to societies of definite historical types, the student of the Analytical School proceeds, with the aid of an *a priori* process, to elaborate his own conception of the inherent nature of rights and law. Such, in general terms, was the method applied to the study of the Science of Politics upon its revival by Machiavelli, Bodin, and Hobbes, after the existing state system of Europe had taken on definite and permanent form.

The group of scholars who founded, something more than a century ago, the science now known as Comparative Philology revolutionized the thought of the world not so much through the marvelous revelations of that science as by the discovery of a new method of investigation that made such revelations possible. Out of the application of the new method to fresh subject matters have since arisen Comparative Mythology, Comparative Politics, and Comparative Law. By the aid of the two sciences last named, as combined in what is generally known as the Historical Method, a flood of light has been shed upon the processes through which the aggregate, commonly called government and law, emerged from progressive history in the nations that have made the deepest impress upon civilization. The Historical Method of investigating the origin and growth of law, public and private, beginning with its germs in primitive society, attempts to explain its nature and meaning through the record of its development. The main difficulty in the way of complete demonstration is the fragmentary character of the evidence as to the initial forms of law in the early periods. Only by a comparison of such fragments as have been preserved in the survivals of ancient law or custom, in the usages of savage tribes and stagnant nations, or in the annals of a few ancient historians, is it possible to reconstruct primitive society as a complete organism. Savigny, the founder, or rather consolidator, of the Historical School, as well as his immediate followers, dealt only with Roman materials; and they applied the new method only in a very limited way to the general theory of politics. The most important outcome was embodied in Savigny's declaration that law is not the creation of the will of individuals, but the outcome of the consciousness of the people, like their social history or their language. In his famous pamphlet, *Beruf unserer Zeit*, published in 1814, he expressed the then new idea that law is a part and parcel of national life. Down to that time comparative investigation of archaic legal systems had scarcely been undertaken at all, certainly not on any considerable scale. The almost unbroken soil

of that rich and inviting field was to be turned over by the plow of one who revealed wonders. Sir Henry Sumner Maine, whose "Ancient Law" appeared in 1861, said in his preface that "The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." In the masterly demonstration that followed he showed that legal ideas and institutions have a real course of development as much as the genera and species of living creatures; that they cannot be treated as mere incidents in the general history of the societies where they occur. The works of these epoch-making men — the one German, the other English — have resulted in the creation of what may be called the natural history of law.

The most important single outcome of Comparative Politics — which may be called the science of state building, the science of constitutions — is embodied in the discovery that the only two conceptions of the state known to the ancient and modern world have been and are represented by aggregations or federations in which the starting-point was the village community. In Greece the first stage in the aggregation is represented by the gathering of a group of village communities or clans into a brotherhood; the second by the gathering of brotherhoods into a tribe; the last by the gathering of tribes into a city-state. In Italy the village community appears as the *gens*. Out of a union of *gentes* arose the *curia*; out of the union of *curiae* arose the tribe; out of a union of tribes arose the city-state. Out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire has gradually arisen the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries, the state as known to modern international law. The typical Teutonic tribe, the *civitas* of Cæsar and Tacitus, represented an aggregation of hundreds, while the hundreds represented an aggregation of townships. The typical modern state in Britain, known as England, represents an aggregation of shires; each shire an aggregation of hundreds; each hundred an aggregation of village communities or townships. The power to subdue and settle a new country and then to build up a state by this process of aggregation constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the federal republic of the United States. After thus unfolding the origin and growth of the political

constitutions of states, ancient and modern, Comparative Politics has undertaken to classify and label such constitutions as buildings and animals are classified and labeled by those to whom buildings and animals are objects of study. Not until the history of the outer shells or constitutions of states had been thus subjected to critical examination at the hands of Comparative Politics, did Comparative Law undertake to unfold the history of such bodies of interior or private law as have existed as distinct codes. The outcome is the discovery that there are existing in the world today only five distinct systems of law: the Roman, the English, the Mohammedan, the Hindoo, the Chinese. A survey of the geographical areas thus occupied discloses the fact that about nine-tenths of the civilized world is now dominated by Roman and English law in not very unequal proportions. Thus it appears that the student of the Science of Jurisprudence is directly concerned only with Roman and English law, from whose histories are to be drawn practically the entire data with which he has to deal. When the external histories of these two world codes are unfolded, side by side, the coincidences, the likenesses, are striking indeed. Each consisted at the outset of a body of customary law which became rigid and unelastic the moment it was reduced to written formulas. Long after that stage was reached each state grew into a world power with vast territorial dependencies. Thus each state was forced so to expand its meager and unelastic code of archaic law as to meet the manifold and ever-changing conditions of the after-growth. That result was worked out in each by identically the same agencies — Legal Fictions, Equity, and Legislation. Each state as it advanced manifested its conservatism by promoting law reform mainly through the agency of judge-made law, — the Roman *responsa* and the English case-law system — presenting parallel processes of innovation in existing rules, made only after exhaustive discussion as to particular deficiencies revealed by the facts of individual cases. As old institutions became obsolete, they were, as a general rule, permitted simply to die out without formal abrogation. Thus at Rome as in England out of the old was slowly evolved, bit by bit, the new.

When the state system of modern Europe, in which the state as the nation is the unit, swept away and superseded the ancient state system in which the city-commonwealth had been the unit, the public law of Rome, constitutional and administrative, was rejected because inapplicable to widely divergent political conditions. What

did survive was the private civil law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of more recent times. It is that system of Roman private law which became the basis of the codes of the Continental nations, whence it passed into Mexico, Central and South America, to certain states in South Africa, as well as as to Scotland and Louisiana. On the other hand, it is the public law of England that has had the widest extension, and is exercising by far the most potent influence by reason of the fact that the English constitutional system stands out as the accepted political model after which have been fashioned the many systems of popular government now existing throughout the world. Since the beginning of the French Revolution nearly all the states of Continental Europe have organized national assemblies after the model of the English Parliament in a spirit of conscious imitation. Not, however, until the typical English national assembly, embodying what is generally known as the bicameral system, had been popularized by the founders of the federal republic of the United States, was it copied into the Continental European constitutions. Nothing is more interesting in the institutional history of the world than the approaches now being made to the constitutional system of the United States by Mexico and the states of Central and South America. In some instances in Latin America, states approach very closely, so far as their constitutional law is concerned, to the English original as modified by American innovations; in others, federal states are organized on the American plan, with certain reservations. But no matter to what extent a Mexican, Central, or South American state may adopt English constitutional law in the structure of its outer shell, its interior code of private law is invariably Roman, — a fact equally true of every Continental European state whose constitution has been founded on the English model. Jurists who view the existing state system of the world as a connected whole cannot fail to perceive, when their attention is specially directed to the subject, that within less than a century in the blending of Roman and English law there has occurred a phenomenon that marks a turning-point in the history of legal development. After centuries of growth Roman public law, constitutional and administrative, perished, leaving behind it the inner part, the private law, largely judge-made, which lives on as an immortality and universality, — as the fittest it survives. In the same way and

for the same reason English public law, the distinctive and least alloyed part of that system, is living on and expanding as the one accepted model of popular government. The phenomenon in question is presented by the blending now going on between the strongest elements of Roman and English law in the state systems of Continental Europe, in those of Latin America, and in that of the state of Louisiana. If the existing state system of France is taken as a typical illustration, we there find the outer shell of the state, the system of parliamentary government, to be purely English through deliberate and recent imitation, while the interior code of private law is essentially Roman. The same thing may be said of every other Continental European state having a parliamentary government. In the state system of Louisiana we find the outer shell of the state to be English, as modified by American innovations, while the interior private law is based on the Code Napoléon. The same thing is true of the seventeen Latin-American republics which have adopted English constitutions in the North American form, while retaining the private law drawn from Roman sources. Is it not therefore manifest that out of this blending of Roman and English law there is rapidly arising a typical state-law system whose outer shell is English public law, including jury trials in criminal cases, and whose interior code is Roman private law? ¹

It would be hard to find any one willing to deny that the star of the Historical School of Jurisprudence is now in the ascendant. Among its many startling revelations the greatest perhaps is that which embodies the dominant idea of the nature of law itself. The world is beginning to understand that law is neither the command of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages, but the expression for the time being of the dominant force of the community. Great jurists have said recently that "the matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of the facts of human nature and history." ² Law is a living and growing organism which changes as the relations of society change. It thus becomes the province of the Science of Jurisprudence to look behind the law into those relations of mankind which are generally recognized as having legal consequences, in order

¹ In a work recently published the writer has ventured to submit, for the first time, this far-reaching generalization to the jurists and statesmen of the world, after having subjected it in advance to the searching and approving criticism of eminent jurists in more than one nation. *The Science of Jurisprudence*, 1908.

² Pollock and Maitland, *History of English Law*, 2 ed., *Introd.*, p. xxiii.

to ascertain whether or no there is unity or even resemblance in the basic conceptions that underlie them. The Science of Jurisprudence is the science of positive law, and its function is to extract from the mass of details, embodied in the several systems of positive law enforced by the political sovereignties composing the family of nations, the comparatively few and simple basic legal conceptions that underlie the infinite variety of legal rules. As Austin has well expressed it: "The proper subject of general or universal Jurisprudence is a description of such subjects and ends of law as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in these several portions." The Science of Jurisprudence may be defined to be an analytical and applied science, which must be applied and reapplied to the data collected by Comparative Politics and Comparative Law as often as it may be necessary to extract from the mass of details, embodied at any given epoch in the then existing systems of positive law, the comparatively few basic ideas underlying all of them. As the science of positive law is a Roman creation, Jurisprudence a Roman invention, we must, according to the Historical Method, begin with an examination of the actual conditions at Rome out of which the science in question arose, in order to illustrate by the facts of history the nature of the processes through which it works out its results. Rome's relation to commerce caused an influx of foreigners whose need of law compelled, as early as 242 B. C., the appointment of a *praetor perigrenus*, whose duty it became to administer justice between Roman citizens and foreigners and between citizens of different cities within the Empire. As such *praetor* could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. Thus we encounter what is perhaps the earliest application of Comparative Law, employed for the purpose of extracting from the codes of all the nations with which the Romans were brought into commercial contact a body of principles afterwards known as the *jus gentium*,¹ the law common to all nations. With the growth of the dominion of Rome and the consequent necessity for the extension of the code of a single city to many cities, there was a natural craving for the dis-

¹ *Itaque majores aliud jus gentium, aliud jus civile esse voluerunt. Quod civile non idem continuo gentium, quod autem gentium, idem civile esse debet.* De Off., iii. 17, 69.

covery of legal principles capable of universal application. In response to such a demand Comparative Law collected the data, and a certain branch of Greek philosophy supplied the theory upon which they could be worked into a consistent whole. The philosophic element was the Stoic conception of a law of nature, a universal code from which all particular systems were supposed to be derived and to which all tended to assimilate. If, through a reapplication of the Science of Jurisprudence to the data collected by Comparative Politics and Comparative Law from all existing codes, a new *jus gentium* should be established for the modern world embodying a uniform conception of legal right, there could be no difference of view as to the inestimable value of the result. The only question is as to the possibility of its attainment. The basis for such a hope is in the fact that while there are five original law systems from which existing codes are derived, there are but two in which the more important nations are really concerned. Roman and English law are now extended over perhaps nine-tenths of the globe. These two systems — the one originating in the code of a single Italian city, the other in the customs of a group of Teutonic tribes — practically divide the world between them. As more rapid intercommunication draws the nations of the world closer together, the longing increases for a modern law of the nations, that is, for a uniform conception of legal right, capable of embodiment in a code of substantive and adjective law, which must emerge, if at all, from existing codes, like the single and typical face in a composite photograph to which many features have contributed their influence.

The Historical Method has put it beyond all question that until we have first ascertained how law grew, it is impossible to understand what it is. Not until the synthesis has ended, not until the growth of all the ingredients that enter into the final composite has been traced, should the analysis begin. Not until the history of the law systems of the civilized world with which we have to deal has been drawn out by the aid of the Historical Method, should an effort be made to classify and define the elements that enter into them by the aid of the Analytical. By that process we arrive at the conclusions: (1) that the sovereign authority of the state is the ultimate source of all laws and legal institutions as they exist; (2) that a positive law, or a law properly so called, is a general rule of external human action enforced by such a sovereign political authority. Law proper should therefore be termed state

law rather than municipal, for the reason that that term, fastened on the English-speaking world by Blackstone against the protest of Bentham, has lost its original meaning with the extinction of the city-state system out of which it arose. With the predicate thus laid it is easy to contrast the internal with the external sovereignty of a state, to trace all law to its origin in three and only three sources, to examine law as the creator and preserver of legal rights, to divide law proper into public and private, and finally to subdivide each of those grand divisions into appropriate heads. After an exhaustive classification of law proper has thus been made, it is comparatively easy to differentiate it from that body of understandings between states, unenforceable by any sovereign political authority, generally known as law by analogy, or international law. When the field has thus been cleared, nothing remains for examination but that set of international rules established by comity for the prevention of conflict of laws in matters of private right. According to the writer's conception of it the Science of Jurisprudence involves the entire process through which the growth of positive law is unfolded by the Historical Method and its elements classified and defined by the Analytical,—a process whose study must inevitably become the preface to every logically organized system of legal education.

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THE COMMODITIES CLAUSE AND THE FIFTH AMENDMENT

SINCE the publication of the June number of this Review for the year 1908, in which appeared Mr. Lewis's paper upon the constitutionality of the Commodities Clause, the Circuit Court for the Third Circuit, sitting in banc, has declared the clause unconstitutional by a vote of two to one.¹ However conclusive Mr. Lewis's reasoning may seem, — and it seems to me quite conclusive, — the decision of this court of high authority must be an excuse for further consideration of the reasoning upon which the clause may be supported.

At the outset some questions may be laid aside, because the defendants themselves seem to concede them. Thus it is not denied that the act affects "interstate commerce," and does not attempt, as did the statute declared void in the Employers' Liability Cases,² to affect more than "interstate commerce." It is true that the question was raised whether the act could be said to affect the carriage of coal by a railroad which had already sold it at the breaker, so that the transportation could be said to be of property owned by another. This is really a question of the interpretation of the statute, *i. e.*, whether the carrier can be said to have any "direct or indirect" interest in such coal. So far as it concerns the validity of the statute, if by its terms it covers such a case, it is no different question from that of whether the carrier may transport its own coal.

Again, it seems to be certain that the act is a "regulation" of commerce. It is true that the defendants do not concede this, and it is perhaps somewhat doubtful whether Judge Gray in his long opinion meant to concede it, but that doubt arises from some confusion of ideas about the meaning of "regulation." It perhaps is true that the "power to regulate is not a power to destroy,"³ when the limitations of the Fifth Amendment are considered, but it is

¹ *United States v. Delaware & Hudson Company*, 164 Fed. 215.

² 207 U. S. 463.

³ *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 331.

now too late¹ to insist that Congress has no power to restrict and in part to forbid interstate commerce, when such restriction or prohibition is not forbidden by any other part of the Constitution. It may be assumed, therefore, that there is nothing in the fact that a "regulation" of interstate commerce takes the form of a prohibition of a part of such commerce, which *ipso facto* makes it unconstitutional.

The question then narrows down to this: Is the clause void because it violates any of the limitations upon the powers of Congress? A large part of Judge Gray's opinion is concerned with proving that the Fifth Amendment does apply to the commerce power. He finds that it does, and it seems strange that the contrary should have been urged, as it apparently was, by the Government.² Judge Gray seems to have felt some embarrassment by the precedent of the embargo, which he supposes to be within the limitation of the Fifth Amendment, but his conclusion that in general the power to regulate commerce is subject to that amendment cannot be seriously disputed.

In American constitutional law much the greater part of the questions that arise concern the meaning of the words, "no person . . . shall be deprived of his life, liberty, or property without due process of law." It has been tacitly assumed by all parties, in this case, that the limitation upon the power of Congress contained in these words was the same as that imposed upon the states. Since our country was the first which did so impose upon popular assemblies any restraint through a written Constitution, our own precedents are the only ones which are relevant. What are they?

Despite the dictum of Mr. Justice Harlan in *Northwestern Life Ins. Co. v. Riggs*,³ that the "liberty" of corporations is not protected by the Fourteenth Amendment, there would seem to be no reason to define differently the word "person" when applied to that part of the Bill of Rights which protects "liberty" from that part which protects "property," and it is settled in general that a corporation is a "person" under that clause.⁴

¹ The Lottery Cases, 188 U. S. 321.

See also for an unanswerable theoretical consideration of this question, Beale and Wyman, *Railway Rate Regulation*, § 1336.

² *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *United States v. Lynah*, 188 U. S. 445; *McCray v. United States*, 195 U. S. 27, 61.

³ 203 U. S. 243, 255.

⁴ *Pembina Mining & Milling Co. v. Pa.*, 125 U. S. 181; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 154; *Smyth v. Ames*, 169 U. S. 466, 522; *Charlotte, etc., Ry. v. Gibbs*, 142 U. S. 386, 391; *St. L. & San F. Ry. v. Gill*, 156 U. S. 649, 658.

There are a number of other decisions upon this point, which it hardly seems neces-

It is a different question whether the state has greater power under "due process of law" over corporations than over individuals, and that question should not be confused by asserting that the word "persons" has a different meaning, though used but once in the Amendment in question. It cannot be wrong, when supporting the act, to assume that the dictum does not create such a distinction.

The word "liberty" seems now, and after *Allgeyer v. Louisiana*,¹ to have got its broader and less historical meaning, and to include the right of a "citizen"—which in this connection is used as "person"—"to enter into all contracts which may be proper, necessary, and essential to his carrying to a successful conclusion" the pursuit of "any livelihood or avocation."

There are two ways in which may be regarded any valid restriction of the "liberty" so defined: one, that where the restriction is "lawful," he has not the "liberty" to do what is unlawful;² and the other, that though the person is deprived of his "liberty," nevertheless he is accorded "due process of law." Though the result is the same, the second method is preferable, as it does not introduce a *petitio principii* into the definition of the word "liberty," by defining it as the right to enter into "lawful" contracts, when the question at issue is whether or not the activity forbidden is "lawful."

It seems then clearest to treat the validity of the Commodities Clause as though the Fifth Amendment did forbid it as a deprivation of the "liberty" of railroad corporations, unless the act was "due process of law."

The next preliminary consideration is whether it likewise deprives such railroads of their "property." This consideration is really irrelevant if the definition in *Allgeyer v. Louisiana*³ be law, because under that definition they are deprived of their "liberty" in any case; and it can only be supererogation to show that they are likewise deprived of their property. But such a limitation upon property rights as is involved in a prohibition to transport their own property is less of a "taking" or "deprivation"

sary to cite. None of these turned upon the point of "liberty." If it was the deliberate purpose of the whole court to distinguish between liberty and property when used in the "due process" clause, it would seem as if such a distinction deserves larger notice.

¹ 165 U. S. 589. I am assuming a corporation's liberty is protected.

² Mr. Justice Peckham in *U. S. v. Joint Traffic Association*, 171 U. S. 505, 572.

³ *Supra*.

than to forbid one to sell liquor theretofore legally owned. There are of course many restrictions which Congress may put upon the use of property short of "depriving" the owner of it.¹ These questions really are important chiefly when the question arises of what is the justification for the taking. Thus, the destruction of property to prevent the spread of a conflagration, or to abate a nuisance, may be a complete "taking," and yet it is legal and the owner has no redress except in the public sense of justice. Even granting that the entire destruction of property must be paid for by a just compensation, the losses arising from incidental limitations in the uses of property are not subject to such a condition when they are necessary to a useful purpose.

The question comes, therefore, to this: Is the Commodities Clause "due process of law"? It is conceded by all sides that it can be supported, if at all, only as an incidental means of regulating the duties of common carriers. The Act to Regulate Commerce² to which it is an amendment has for its purposes to secure, first, equal rates and means of transportation for all shippers, and, second, the regulation of rates. That this purpose is within the legitimate powers of Congress was expressly conceded by the defendants and has been implicitly recognized by the court in numerous cases.³

If there is a reasonable or necessary relation between the general purpose of securing equal treatment for shippers and of regulating rates, and the provisions of the clause itself, then it must be a valid enactment, since the grant of a power implies all those ancillary powers which are necessary or appropriate to its exercise.⁴ All the discussion which has arisen about the act resolves itself into the single question whether or no the clause is such a necessary or appropriate incident as the court may see to have a "real or substantial relation"⁵ to these purposes.

The argument against the act is that while under New Haven

¹ *Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, 137 U. S. 86; *Transportation Co. v. Chicago*, 99 U. S. 635.

² 24 Stat. 379; 34 Stat. 584.

³ *New Haven Ry. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *Interstate Com. Com. v. Cincinnati, N. O. & T. P. Ry.* 167 U. S. 479; *Interstate Com. Com. v. Louisville and Nashville Ry.*, 190 U. S. 273; *Southern Pacific v. Interstate Com. Com.*, 200 U. S. 536; *Gulf, Col., etc., Ry. v. Hefley*, 158 U. S. 98; *Tex. & P. Ry. v. Mugg*, 202 U. S. 242; *Tex. & P. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

⁴ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

⁵ *Mugler v. Kansas*, 123 U. S. 623.

Ry. Co. *v.* Interstate Commerce Commission,¹ Congress has the fullest power to prevent any actual discrimination, the clause forbids all transportation of its own products by the carrier whether discriminatory or not; that it cannot be assumed or presumed that the carrier will *certainly* and in every case abuse his power and violate his public duties, but rather it must be presumed that he will not; that to forbid all such traffic is to condemn the innocent with the guilty and has no necessary or even reasonable relation to the securing of the chief purpose of the act.

The answer to this reasoning is twofold: first, that the clause is designed not to punish offenders of the act in general, but to remove an obvious motive of partiality in the conduct of those who exercise public duties; and, second, to obviate the difficulty of detecting actual offenders by prohibiting a kind of business in which offenses are most likely to arise.

As to the first of these purposes the question arises whether the situation of the carrier is analogous to that of a trustee or other fiduciary, or of a public officer, who has a personal pecuniary interest in the exercise of his duties. If there is an analogy, it cannot fairly be said that the clause has no just basis in the law, because it has for long been a principle not only of judge-made law, but of statutes, that a fiduciary, private or public, is not free to have any personal interest in the discharge of his duties. His temptation to favor himself at the expense of the beneficiaries whom he represents, makes all such transactions illegal. Under the rule in *Murray v. Hoboken Land Company*,² "due process of law" is customary and usual process of law, — the kind of regulation of conduct which as a society we have inherited and to which we are accustomed. If the analogy suggested is well chosen, Congress has done no more than subject the railroads to the same limitations which from early times have been imposed upon all other public servants under our inherited system of law. The statute, in that case, is no other than the statutes which forbid federal officials from having any pecuniary interest, direct or indirect, in any contract which they must make in the discharge of their duties. That the clause goes into effect after these public servants have invested great sums upon the assumption that they might retain their ambiguous position, is no reason to deny the power to Congress to terminate their practice. Although they may be entitled to some consideration because of a long immunity,

¹ *Supra*.

² 18 How. (U. S.) 272.

they can appeal only to the sense of justice of Congress. Its failure earlier to observe that the practice was undesirable, or its failure to act, can give no vested rights to public servants to continue the practice. It is as if no statute forbade public officers from being interested in government contracts, so that the practice was not illegal; and, in reliance upon that immunity, certain of those officers had built up a large business of dealing with themselves. Surely, they could not insist that an act was invalid which forbade them to continue that business in the future. If they had any claims to be protected against the ensuing loss, such claims would not result in taking from Congress the power to stop so undesirable a practice. The due process of law accorded such officers would be precisely the process accorded all public officers or other fiduciaries, since the time whereof the memory of man runneth not; only they had enjoyed an immunity for the time being, due to the indifference or ignorance of Congress.

However, I have hitherto assumed, without considering, that a railroad which has the right to transport its own products is in a position analogous to that of a public officer who is interested pecuniarily in the performance of some of his duties. Its duties are to transport goods offered, to charge reasonable rates, and not to charge less than the established rates to any shipper. In what ways does the ownership of its own products create a contradictory interest in the carrier? First, the railroad can favor the transportation of its own goods by refusing to carry the goods of others, when pressed for adequate facilities to meet all demands. It is beyond the power of most human nature in such a case to hold even the scales of impartial distribution and to let a part of its own product go unmarketed in a high market, that competitors may successfully compete. Second, it may market its own product at such figure as it pleases, its apportionment between sale-price and carriage being mere matter of book-keeping. By so controlling the market it can in the end get a monopoly of the supply,¹ which is the very thing that has happened in the case of these coal railroads, who allege in their answers that they now control nearly ninety per cent of the anthracite coal in Eastern Pennsylvania. It is true that if the competing shipper can show that the total price received for product and carriage is less than the fair market value plus the established tariff, he can obtain relief,

¹ *New Haven Ry. Co. v. Inter. Com. Com.*, 200 U. S. 361; *Attorney General v. Great Northern Railway*, 29 L. J. Eq. (N. S.) 794.

but the wrong is then done him and it is to remove the incentive to that wrong that the clause was enacted.

It cannot then be seriously contended that the situation of an owner-carrier is not analogous to that of any other fiduciary who is interested personally in the discharge of his duties. His duties are to treat all equally, and his interest is to market his own goods with greater convenience and at lower rates than his competitors' goods. Indeed, it is enough that shippers over his line are his competitors to bring at once into evidence the fact that he cannot occupy an impartial position. It is not enough, therefore, to show that in a given case, or that in many cases, the railroads have discharged their duties impartially, were such proof possible. That would not in the least affect the force of the fact that they never could be free from a bias, under which the law does not permit any other fiduciary, private or public, to perform his duties, and from which the railroads have no right to assume that they are immune.

The second defense for the act is that it will prevent the commission of what would be conceded wrongs, but which are difficult of discovery or punishment. The facts are peculiarly within the carrier's knowledge. It is only by an inquisition that one can ascertain whether the service rendered a shipper is all that he can fairly ask, and whether or not he is being oppressed either to give the carrier's trade the first facilities or to drive him to terms. It is, of course, true that to forbid the carrier from carrying his own goods may result in preventing much carriage which is quite innocent, and not within the purview of the act at large. It is, however, by no means unheard of in our law, and therefore out of its "due process," to forbid conduct which may be the overt evidence of either an innocent or a guilty act, but as to which it is difficult to know whether it is in fact the one or the other. The curtailment of the liberty of the innocent citizen is justified by the prevention of wrongs which are impossible to detect.

Thus we all know that the carrying of concealed weapons, or the possession of burglarious tools, of counterfeit money, or of game out of season, is each criminal, though all may be quite harmless in the individual case.¹ On the whole, there is reason to

¹ The very recent case of *Silz v. Hesterberg*, 211 U. S. 31, 40, holds that the possession of game shot without the state even when distinguishable from game shot within the state may be forbidden, in the interests of a general protection of the state's own game supply. It is in point here. See also *Lawton v. Steele*, 152 U. S.

believe that they are not innocent in the majority of cases, and the state may prevent much wrong at the expense of little hardship. As in much other legislation, the result is determined by an account in which there is a debit, as well as a credit, column.

Similarly, the purpose which justifies the Statute of Frauds depends upon the fact that the oral evidence accessible for contracts is doubtful and difficult to procure. Many good contracts go by the board that false contracts may not be foisted upon the citizen. His "liberty" to make a valid oral contract is taken from him because he is protected in the end more completely.¹

Indeed those cases seem to be in essence indistinguishable in which a statute is passed making certain facts presumptive of others;² because although such statutes do not determine the matter conclusively, none the less the person, against whom the presumption obtains, in many cases may be totally unable to rebut it, and that too in a case where the actual facts do not accord with the presumption. The distinction between such cases as lay down the rule absolutely, and such as make it only presumptive, is therefore not thoroughgoing, if it be not due process of law to deprive one of one's liberty in order to establish a general rule which in the majority of instances will effect a desirable result. The same reasoning must apply to all legal presumptions.

The "oleomargarine" cases illustrate an application of the same principle.³ In these cases the court upholds the right of a state, if it does not impose any regulation on interstate commerce, to forbid the sale of oleomargarine, even though harmless, without some distinguishing mark. It would seem that to insist upon such a distinction in the sale of this harmless but somewhat ambiguous product is justifiable only because it is an easy subject of substitution for butter. Much oleomargarine will be frankly sold as such; not all will be fraudulently substituted for butter, and the "liberty" of the citizen to sell undistinguished oleomargarine is certainly taken from him by a law which compels him to color it pink, or to mark it in any other way. If such a law be valid, there is no

¹ For an interesting case of similar character, see *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. *circa* p. 200 (case not yet reported).

² *People v. Cannon*, 139 N. Y. 32.

³ *Powell v. Pennsylvania*, 127 U. S. 678; *Plumley v. Massachusetts*, 155 U. S. 461; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238; *McCray v. United States*, 195 U. S. 27, 62. The case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, did not mean to overrule the earlier cases and went off wholly upon the question of how far the act affected interstate commerce.

just ground for it, except that the opportunities for fraud are so great as to counterbalance the hardship imposed upon the honest sellers.¹

In the case of the Commodities Clause the same reasoning applies. It is certainly not for the courts to say that the practice of transporting its own products by a railroad does not lend itself to a violation of the law against discrimination, which it is impossible or difficult to detect. That such discrimination may go long undetected is shown by *New Haven Railway v. Interstate Commerce Commission*,² and will not indeed be disputed. Whether that danger is of enough importance to justify so drastic a measure as the total prohibition of the trade, would seem to be exclusively a matter for the legislature.

Much of the discussion about the clause has turned upon the scope of the "police power," and its possession by Congress. I have tried to avoid the use of that term because its meaning is so vague that it too often clouds discourse, but it is impossible wholly to leave it unconsidered, since it is the basis of many of the decisions which have been cited. If by the term is meant only a portion of the legislative power, then it is not coincident in meaning with "due process of law." On the other hand, it may mean what Chief Justice Taney says: "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws."³ Again consider the recent declaration of Mr. Justice Harlan in *Halter v. Nebraska*:⁴ "Each State, when not thus restrained and so far as this court is concerned, may, by legislation provide not only for the

¹ A somewhat similar kind of provision is the establishment by "standards" of the excellence of articles of food, even when it excludes wholesome articles in a given case. *Buttfield v. Stranahan*, 192 U. S. 470.

² 200 U. S. 361.

³ *The License Cases*, 5 How. (U. S.) 504, 583.

⁴ 205 U. S. 34, 41.

health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people." If it means this, then the matter is not advanced by saying that the legislature is using its police power. "Due process of law" will, therefore, mean the kind of regulation proper and customary for legislatures,¹ and that is the police power in its fullness. The theory that there is a peculiar cogency, or immunity from constitutional limitation, to legislative enactments within the police power cannot survive such definitions as include in that power the "general welfare," "prosperity," "wealth," and "convenience" of the people.

Therefore a decision which holds that some act is within the police power must in the end be regarded as holding that it is "due process of law," and there seems no gain in adding so confusing a term to this discussion, or indeed to any other. It is so pregnant with question-begging, so vague and so variously phrased in definition, that it is not too much to say that from it have arisen most of the difficulties that lead to such obscurity and conflict in what might otherwise be reasonably intelligible.

To a consideration of the Commodities Clause one thing remains, and that, the chief real difficulty in the way of its constitutionality; that is, the exception of all lumber from its operation. Several attempts at justification have been made. Judge Buffington in his dissenting opinion in *United States v. Delaware & Hudson Company*,² suggests that there is no need of including lumber, since it is transported by water. Mr. Lewis says in his paper,³ that in the case of the transcontinental roads their timber lands were given by Congress as an inducement for construction, and that they must have the right to carry the growth over their lines. Neither excuse is adequate, for much lumber is in fact carried by rail, and the grant of timber-lands was subject to the same congressional powers as any other property. Have not the owners of the alternate timber sections bordering the Northern Pacific Railway the same right to protection against discrimination as the few independent coal operators of Pennsylvania? No substantial reason can be given why they should be subjected to possible oppression from which others are relieved.

Moreover, the objection has an added seriousness because under

¹ *Murray v. Hoboken Land Co.*, 18 How. (U. S.) 272.

² 164 Fed. 215, 258.

³ 21 HARV. L. REV. 616.

the Fourteenth Amendment such legislation would be void,¹ unless some reasonable ground could be shown for the exception. In those cases as in others where discrimination has been the cause of the statute's invalidity,² the decision was placed upon the clause of the Fourteenth Amendment which does not appear in the Fifth: "nor deny to any person within its jurisdiction the equal protection of the laws." Therefore, unless the court is to invent some distinction in the nature of things which certainly does not appear upon the surface, it must face the serious question of whether, because of the omission from the Fifth Amendment of the "equal protection" clause, Congress may make arbitrary distinctions in the protection which it extends to persons equally situated; that is, that it may protect some shippers but not all, though all need protection.

So far as concerns the shippers themselves such a law does not deprive them of property or liberty. Such disadvantages as they labor under are the result of their economic position, not of the action of Congress, which has only failed to relieve them when it should. Congress cannot, by such inaction as to them, take away their property or their liberty. Therefore the clause is not within the Fifth Amendment because it excepts from its protection the shippers of lumber.

The railroads say, however, that any law which imposes even a proper burden unequally is not "due process." Of course, this is not the imposition of a burden whose inequality makes itself heavier upon those who alone suffer it. The railroads would not be in any measure relieved if they were likewise forbidden to carry lumber. Yet it would seem that if the railroads could with justice say that there was arbitrary favoritism in the statute in excepting certain railroads from its burdens without any good reason, the law might still come within the rule in *Connolly v. Union Sewer Pipe Company*.³ The railroads' "liberty" is indeed "taken," and a law which denies to them "equal protection" would probably be regarded as denying to them "due process" for that reason.⁴ While the court has at times been very astute to find some possible ground for distinctions made by the legislature,⁵ still the rule remains unim-

¹ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, C. & S. F. Ry. v. Ellis* 165 U. S. 150; *National Cotton Oil Co. v. Texas*, 197 U. S. 115.

² *Cotting v. Kansas City Stockyards*, 183 U. S. 79.

³ 184 U. S. 540.

⁴ *Duncan v. Missouri*, 152 U. S. 377, 382.

⁵ *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251; *M. K. & T. Railway v. May*, 194 U. S. 267; *Cook v. Marshall County*, 196 U. S. 261.

paired that there must be some conceivably rational basis for the distinction.

But there is a very fundamental difference between the discrimination effected by the act between the shippers and that effected between railroads. The discrimination between shippers divides them into classes, since the shippers of lumber are not protected, while all others are. Were it not for the absence of the "equal protection" clause, they would come within the rule in *Connolly v. Union Sewer Pipe Company*. As it is, the denial of equal protection to them is irrelevant, because neither their property nor their liberty is affected by the act, and the Fifth Amendment only protects their liberty and their property. The discrimination does not so divide railroads into classes, however, because it affects all equally in so far as they are or may become lumber owners, and any of them may be such, and most of them probably are already so in some degree.

Now, under the rule in *Cox v. Texas*,¹ the rule of *Connolly v. Union Sewer Pipe Company*,² is confined to such statutes as effect arbitrary distinctions between classes of persons, and the rule does not extend to the imposition of an arbitrary burden upon a part only of the activity of all classes generally. In that case a Texas statute regulating the sale of liquor had excepted from its operation sales by producers of wine made from Texas grapes. The court said that the point had not been pressed of the discrimination between the producers of Texas wine as sellers and other sellers of Texas wine. They said that the point actually urged was between the sellers of foreign wine and that of Texas wine, and that, as it did not appear that there was any class consisting of sellers only of Texas wine, and another class of sellers only of foreign wine, but as, on the contrary, it appeared that wine-sellers sold foreign or domestic wine indiscriminately, the discrimination in the statute, even if arbitrary, was not such as the Fourteenth Amendment affected, because it did not deny to any class of persons the equal protection of the law.

This decision seems to be directly in point in the case of the Commodities Clause, since the discrimination effected by the lumber exception affects equally all railroads, in so far as they are or may become lumber owners, and does not cut out any particular class of railroads from the burden of the act, except as they may by chance happen to be lumber owners.

¹ 202 U. S. 446.

² *Supra*.

Although the point is a narrow one, it would seem, therefore, that neither in respect of its effect upon shippers nor in respect of its effect upon railroads is the exception fatal to the act, even though it be regarded, as I think it must, as being based upon no rational distinction. It is no answer to say that the Constitution does not permit arbitrary discrimination. It permits Congress to act within its powers except as they are limited. Many abuses may exist against which the courts cannot relieve, and for which the only remedy is in such popular feeling as may be reflected in congressional action. The Constitution does not create the courts as certain safeguards from all legislative injustice, but only to keep the legislature within its proper powers. It may use those powers unwisely or unjustly, and the courts have no right to interfere. In this case the evil may be in fact exaggerated, the necessity for so stringent a remedy may not exist, the statute may bear unequally, and much damage may be done to innocent persons. Not all these considerations together have any proper weight with a court, and none of them lends any actual weight to the argument against the act's validity.

However little this should be, it is indubitably the fact that such considerations largely determine the decisions, and the defendants made liberal use of this appeal to the sentiments of the court, an appeal whose success was clearly enough reflected by the prevailing opinions. It cannot be out of place in closing to consider the claims of the defendants to especial consideration. As Judge Buffington points out,¹ the defendants since 1874 have transported all their coal in violation of the direct and express provisions of the constitution of the state of Pennsylvania. Any claim of hardship must be limited to such ownership as antedates that period. The fact that the legislature of Pennsylvania has never passed the laws necessary² to the operation of the clause is wholly beside the mark, because the roads remained subject to such regulation whenever the legislature awoke to its duty. They can claim no indulgence because of the legislative inaction.

The gravamen of the defendant's appeal consists in the assertion that many millions of dollars of their property will be destroyed. Let us suppose that in an attempted compliance with the statute they distributed to their shareholders certificates of interest in coal lands, or coal shares, similar to the "ore certificates" issued some

¹ P. 253.

² *Commonwealth v. N. Y. L. E. & W. R. R.*, 132 Pa. 591.

time since by the Great Northern Railway under no compulsion whatever. This would require the conveyance of title in the lands, or in the shares, to trustees, but the shareholders would in the end hold the same proportionate interest in the coal through "certificates" as they did formerly through their ownership in the stock. Two questions arise as to this: would it "deprive" the carriers of their "property;" and, would it comply with the act?

The legal title of the property would by hypothesis pass from the carriers and be vested in trustees. The ultimate beneficial interest would remain the same. In the case of the Great Northern Railway no contest was made—or at least none was made in good faith—when the change took place. It was recognized as a legitimate method of internal management, and no one considered that his "property" had been affected.

It may be that such a distribution would affect the value of the securities; but it is important to remember that some of the decrease in value may be the measure of that very advantage of discrimination and of ultimate monopoly which it is the purpose of the act to destroy. In so far as the fall in such shares reflects the popular estimate of the loss in the carriers' ability to market their coal upon more advantageous terms than independent shippers, and to control all the anthracite supply, in just so far the "property" so "taken" consists only of their practical security from detection in the commission of crimes. That is a "property" which the court cannot consider.

There are other difficulties which may probably cause trouble. All of the coal roads are mortgaged, and some uncertainty will certainly arise as to the marshalling of the lien between the coal and the railway shares. In some of the mortgages the railway covenants not to part with the coal properties, and a question may arise as to the violation of that covenant. No one can seriously suppose that this question would remain long at issue between the bondholders and the shareholders, if the alternative were, as it appears to be, the total discontinuance of mining coal. There is little doubt that these questions, and perhaps others not now known, may cause a decided fall in the value of coal-road shares and a corresponding loss to many persons. That is by no means a "taking" of the stockholders' "property," and it is no ground for the moving pictures of destruction and coal famine with which the defendants appealed to the Circuit Court. The coal will continue to be mined, and the shareholders will not find their property con-

fiscated except in so far as that property consisted of a pecuniary interest dependent wholly upon a practice which has already been illegal for thirty-five years.

But this brings us to the second consideration,—whether such a distribution among shareholders would be an adequate compliance with the Commodities Clause. That it would be a literal compliance cannot be questioned. The titles would be vested in separate “persons,” and the beneficial interests would at once be separately transferable, and would be in fact soon transferred to some extent into separate hands. It is, however, most likely that the actual majority control of both sets of shares would remain in the hands of one set of persons. In the case of the Northern Securities Company the court¹ decreed that the shares of the two roads be distributed *pro rata* to all shareholders, and this was subsequently done after some further litigation.² There is little doubt that the majority of the shares of each road still remain owned by the same persons, and that the means of repressing competition still exist nearly as effectively as before. Yet the Sherman Act is no longer violated.

In the event of a distribution such as suggested, the temptation to discriminate would remain, and the difficulty of detection. So long as there remained a unity of ownership in the majority of the stock of both the coal properties and the roads, little would seem to be accomplished of the purpose which actuated the clause, and yet, in analogy with the Sherman Act, it could not be said that the roads had not complied with the law. There would at least be a minority of stockholders of the railroad not concerned in the coal property, whose interest would induce them to prevent favoritism, so far as they could discover it, and who could prevent it if they did discover it. Their presence would certainly be an added impediment to the success of such discrimination.

However efficient the present clause may be, it goes no further than to require what has been suggested. It is no matter for the court to decide whether or not it goes far enough. Should subsequent experience prove the necessity of a further statute forbidding the ownership by the same persons of both coal and railway shares, that statute must stand upon its own feet and meet its own difficulties, which would be great in practical execution if not in constitutionality. In any case the Commodities Clause is not such

¹ Northern Securities Company v. United States, 193 U. S. 197.

² Harriman v. Northern Securities Company, 197 U. S. 244.

a statute. It calls for no more than an independent ownership of coal and railroad. That is one step towards a complete divorce of interest between carrier and shipper. It may prove step enough, or it may lead to further progress. It is as far as Congress has as yet gone, and no injustice is involved in taking it.

Learned Hand.

NEW YORK.

LODE LOCATIONS: A SPECIFIC QUESTION OF EXTRALATERAL RIGHTS AND A GENERAL THEORY OF INTRALIMITAL RIGHTS.

I. A QUESTION CONCERNING THE EXTRALATERAL RIGHTS INCIDENT TO OWNERSHIP OF A JUNIOR LODE LOCATION WHICH PARTLY OVERLAPS A SENIOR LODE LOCATION.

MAY the lines of a junior lode location be laid across the surface of a valid senior lode location for the purpose of securing to the junior locator apex rights on so much of the vein as apexes within the lines so laid, excepting only where a conflict arises with the apex rights of the senior locator?

Since the decision of the Del Monte case,¹ it has been very generally, but not universally, considered by mining lawyers that this question may be answered affirmatively.

The facts in the Del Monte case are illustrated by the plat on page 267.

The three locations shown on the plat were all patented. Both as to time of location and as to time of patent, the order of seniority was Del Monte, New York, Last Chance. The triangle B, however, notwithstanding the seniority of Del Monte as to location, was, by express agreement with the owner of the Del Monte, patented to the owner of the Last Chance.

The owner of the Del Monte, though holding the oldest of the three locations, could not, of course, since the location included no part of the apex of the vein within its boundaries,² have any right

¹ Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55.

² The vein was a broad lode. In Del Monte M. & M. Co. v. New York & L. C. Co., 66 Fed. 212, it was claimed that the hanging wall lay within the Del Monte territory. The court said: "In the present inquiry the outcrop of the lode will be taken to be . . . on the line of the foot-wall as shown on the diagram" (p. 213). Lindley (pp. 993-994) states: "The case involving the extralateral right of the Last Chance as against the Del Monte [Del Monte M. & M. Co. v. Last Chance M. Co.] was presented to the circuit court of appeals upon an agreement of counsel that the course of the foot-wall as marked in the diagram . . . should for the purposes of the case be deemed to be the course of the apex." For broad lode questions, see Lindley, Mines, § 583; Snyder, Mines, § 803.

surface by one or the other of the owners of the junior locations. The first action involved the apex rights, if any, incident to the ownership of the New York only. The second action involved the apex rights, if any, incident to the ownership of the Last Chance only. These two actions, therefore, may be distinguished, for brevity, by calling the first *Del Monte v. New York*, and by calling the second *Del Monte v. Last Chance*. *Del Monte v. New York*³ was not appealed from the Circuit Court; *Del Monte v. Last Chance*⁴ was taken up to the Supreme Court, and is now commonly known as the *Del Monte* case.

In *Del Monte v. New York* it was held that the line $r-s'$ must be drawn, parallel with the end lines of the New York, from the point of departure of the vein from the easterly side line of the New York, and that the apex rights of the owner of the New York, as against the owner of the Del Monte, must be bounded on the north by such line, the court saying:⁵ "Following the course of the end lines of the New York location in a westerly direction from this point [r], there is a considerable space [the triangle $s'-r-s'$], which widens in the westward course between the line last mentioned ($r-s'$) and the north compromise line [$r-s'$, practically]. To this respondent is not entitled, as against complainant, the owner of the Del Monte claim. So much of the territory last mentioned [the triangle $s'-r-s'$] as lies west of the east side line of the Del Monte location [i. e., $v'-v''-o'-o$] is subject to the prayer . . . As to the territory south of that last mentioned [i. e., south of the line $r-s'$], the motion [that is, the motion for an injunction restraining the owner of the New York from extracting ore from under the surface of the Del Monte] will be denied."⁶

³ *Del Monte M. & M. Co. v. New York & L. C. Co.*, 66 Fed. 212.

⁴ *Del Monte M. & M. Co. v. Last Chance M. Co.*, 171 U. S. 55.

⁵ P. 215.

⁶ The question as to the extralateral rights of the owner of the New York, though general in form, and without specific reference to the New York, was nevertheless certified to the court in the *Del Monte* case (see question 4, 171 U. S. 60), and was considered and answered. The question referred to was as to the extralateral rights, in general, of any locator whose vein passes through one end line and one side line of his location, and the court decided that, in such case, the extralateral rights must be limited by a line parallel with the end lines, drawn from the point where the vein crosses the side line. In so deciding, the court merely followed the well-settled rules evolved from the principles discussed in the *King v. Amy*, 9 Mont. 543, rev'd 152 U. S. 222, *Tyler v. Last Chance*, 71 Fed. 848, and *Fitzgerald v. Clark*, 17 Mont. 100, and many other cases to the effect that though the true end lines of a location, irrespective of how they are called by the locator, are the lines crossed by the apex, yet that not every line which is crossed by an apex is an end line; that when two lines are crossed by an apex they may

In *Del Monte v. Last Chance* (the *Del Monte* case) the court expressly decided that the owner of the *Last Chance* had extra-

both be considered to be end lines only if they are opposite to each other; that if the apex crosses one end line and one side line of a location, the line designated by the locator as an end line will be held to be the true end line, and an imaginary line parallel with such end line will be drawn from the point at which the apex crosses the side line; and that vertical planes drawn through such parallel lines, and extended indefinitely across the opposite side line, will bound the territory within which the locator may pursue the vein inside and outside the boundaries of his location. Thus the Supreme Court held in effect, in the *Del Monte* case, as the Circuit Court had previously held in fact, in *Del Monte v. New York*, that the extralateral rights of the New York must be limited on the north by the line $r-z'$, parallel with the end lines, drawn from r , the point of departure of the apex from the side line (pp. 86-91).

On page 85 of the opinion, however, the court seems to intimate that the New York had extralateral rights as far north as the line $e-h'$. The expressions of the court, in this regard, are as follows: "It is obvious that the line $e-h$, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line $r-s$, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York." Lindley, 1057-1058, explaining this reference to the line $e-h'$ as the northerly boundary of the extralateral rights of the owner of the New York, states that the court meant the line $e-h'$ applied at r , "making the line $r-z-z'$." The court in the *Copper Trust* case, 65 Pac. 1024, considered that the court in the *Del Monte* case, in stating its reasons for refusing to consider the extent of the extralateral rights of the owner of the *Last Chance*, merely mentioned the line $e-h'$ as being a line to the north of which the owner of the New York could have no rights "under any circumstances." At any rate, in view of the positive holding of the court on the general question of extralateral rights incident to ownership of a location like the New York, the somewhat careless reference to the line $e-h'$ must be disregarded.

Snyder, however, takes the expressions on page 85 of the opinion literally. He states (p. 705): "The New York was not a party to that litigation, and of course its rights were not determined, though they were incidentally referred to, such reference, however, not being necessary to a decision of the questions before the court. In discussing the possible rights of the *Last Chance* to pursue the vein on its dip at any point south of the projected line $r-s$, the court speaks of the vein south of the line $e-h$, projected beyond its intersection with $r-s$, as the property of the New York, but there is no warrant in law for any such right north of point x [that is, the point s on our plat], for want of an apex. Whether the court will adhere strictly to this dictum," etc. In the first place, a glance at the plat will show that if the apex rights of the owner of the New York had extended as far north as the line $e-h'$, such rights might well have been considered by the court in its determination as to whether or not the owner of the *Last Chance* had rights, under the surface of the *Del Monte*, everywhere north of the line $r-s'$. Furthermore, if it were granted that a question as to the extralateral rights of the New York called for a judicial expression of opinion on a point not necessary to the determination of the point in issue, and that the court might therefore have refused to answer it [as it did with respect to the question as to whether or not the *Last Chance* had extralateral rights to the south of the line $r-s'$ (see *infra*)], still it is doubtful that any holding concerning the extralateral rights of the owner of the New York, since the court was not considering the case on its merits (it expressly refused so to do, pp. 91-92), but was merely answering a question certified to it by the court below, can properly be characterized as a dictum. Finally, it may be said that Snyder, in considering the expressions on page 85 of the opinion to be a holding to the effect that the northerly

lateral rights north of the line $r-s'$.⁷ The court, however, refused expressly to decide, one way or the other, as to whether or not the owner of the Last Chance had extralateral rights to the south of the line $r-s'$, saying: "The portion of the vein in controversy is that lying under the surface of the Del Monte claim and between two vertical planes, one drawn through the north end line of the

boundary of the extralateral rights of the owner of the New York was the line $e-h'$, overlooks the decision of the court as to the extralateral rights incident to the ownership of a location like the New York, which definitely fixed the northerly boundary of the extralateral rights of the owner of the New York as the line $r-z'$. However, having reached the erroneous conclusion that the court had fixed said boundary as the line $e-h'$, and being fearful lest this supposed holding be adhered to in subsequent adjudications, Snyder laboriously, and in contravention of the well-settled rules established by the decisions above cited, constructs a line from the point s , parallel with the end lines, as the most northerly line which it is possible to establish as a boundary of the extralateral rights of the owner of New York. It is to be noted that this line is actually farther north than the line really established by the court criticized, and by the court in *Del Monte v. New York*. Snyder suggests his line under the doctrine of a "judicial apex." Beyond the point s , he says (p. 705), "there is no warrant in law" for any extralateral right, "for want of an apex, or anything that may be called an apex." It is hard to understand what there is that may be called an apex north of the line drawn from r , but not north of the line drawn from s . It is hard to understand, further, whence comes any "warrant in law" for the line drawn from s . It may be added that the term "judicial apex" is very differently used by Lindley as a synonym for true or judicially determined apex (index, p. 2002, and § 310), and that apparently there is no such doctrine as Snyder's judicial apex doctrine recognized, or even mentioned, by the courts.

The "theoretical" or "legal" apex doctrine doubtfully discussed by Lindley (§ 312 a) is not similar to Snyder's "judicial" apex doctrine. The former is merely an effort to create an imaginary apex where the true apex has not been, and cannot be, located under the lode mining laws — it seeks to give extralateral rights where otherwise there would be none, because of the impossibility of locating the true apex. The latter doctrine, on the other hand, is an effort to create an imaginary apex where the true apex has already been located under the lode mining laws — it seeks to give double extralateral rights, or extralateral rights in two different directions from one and the same apex. In other words, Snyder's "judicial" apex doctrine seeks to give to one who has not located, and who is not the owner of, a given portion of an apex, an extralateral right which can be properly based only on a location of, and ownership of, such portion of the apex. It seeks to give to A extralateral rights referable to a portion of an apex which is not included within A's territory, notwithstanding that such portion of the apex has already been located by B, simply because B follows his dip rights in a direction different from that which would have been followed by A had he located the portion of the apex in question. For the invention of this legal curiosity by Snyder we are indebted to the ambiguity of the expressions used by the court in the *Del Monte* case, and it may be added that this subject is of peculiar interest in this discussion because the reasoning followed by Snyder in evolving his "judicial apex" doctrine was clearly a development of, and is not logically to be differentiated from, the reasoning of those who hold that a junior locator may lay his end lines upon a senior surface for the purpose of securing to himself extralateral rights with reference to a portion of the apex which has already been previously located.

⁷ Pp. 69-85.

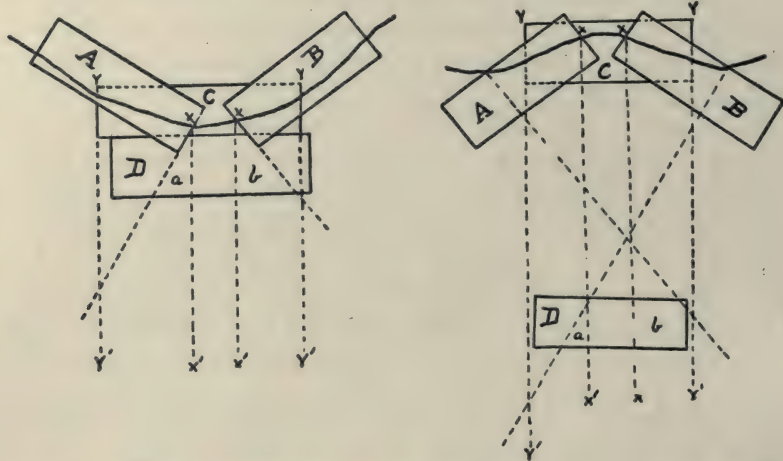
Last Chance claim extending westerly, and the other parallel thereto and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram.”⁸ “In other words, . . . the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r s*, . . . Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered.”⁹

In reaching its express conclusion, however, that the owner of the Last Chance had extralateral rights north of the line *r-s'*, the court considered a question certified to it by the court below, as follows: ¹⁰ “May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?” It is to be observed that this question, in the form in which it was put, was so broad as to permit of an affirmative answer if the court found that a junior locator whose location was marked as indicated had *any extralateral rights whatever* not in conflict with the extralateral rights of the senior locator, or, as stated by the court,¹¹ “the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. . . . The question is not distinctly presented whether . . . the vein up to the limits of the south end line of the Last Chance, *b c*, . . . belongs to the owners of the Last Chance or not.” Therefore, in answering this question affirmatively, the court might, and did, consider the question to be merely as to whether or not a junior locator may lay an end line upon the surface of a senior location for the purpose of securing to himself an extralateral right to so much of the vein only as apexes within the previously unoccupied surface. In other words, in answering this question affirm-

⁸ P. 59.⁹ P. 85.¹⁰ P. 59.¹¹ P. 85.

atively, the court decided that a junior locator may lay his end lines upon a senior surface for the purpose of securing to himself extralateral rights—that is, *some* extralateral rights, extralateral rights on at least some of so much of the vein as apexes between his end lines—the senior locator being thereby deprived of no extralateral rights. But, in answering this question affirmatively, the court did not expressly decide that a junior locator may lay his end lines upon a senior surface for the purpose of securing to himself extralateral rights on *all* of so much of the vein as apexes between his end lines, excepting only where a conflict arises with the extralateral rights of the senior locator. That question, said the court,¹² is “for further consideration.”

The difference between the holding as made and the proposition as authority for which the case has since been generally but not uniformly cited, is illustrated by the following diagrams:



The express holding in the Del Monte case is in point to establish a right in the owner of location C, in the above diagrams, to the ore under the surface of location D, between the lines $x-x'$: the case has been cited as authority for the proposition that the owner of location C is also entitled, as against the owner of location D, to the ore under the surface of the territory indicated by a and b .¹³

¹² P. 86.

¹³ Another development of the doctrine enunciated in the Del Monte case should here be noticed for the purpose of preventing its confusion with the proposition under consideration. Thus Lindley (pp. 655-656) states: "It is manifest from a con-

But while it is certain that the Del Monte case is not direct authority for the broad proposition to establish which it is cited — the court going even so far as to say,¹⁴ “Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him” — it still remains to be considered whether or not the Del Monte case is indirect authority, or authority by necessary implication, to establish that proposition. That is, it remains to be considered whether or not the reasoning of the court in holding that the owner of the Last Chance had extralateral rights north of the line $r-s'$ applies with equal force to establish that it also had extralateral rights south of that line; or, in other words, that it had extralateral rights on a segment of the dip of the vein as long as the length of the apex included between the end lines $a-d$ and $b-c$, excepting only as those parts on the dip of the vein to which the owner of the New York had extralateral rights; or, still more specifically, that the extralateral rights of the owner of the Last Chance were limited on the south only by the line $r-z$ extended to z' , and thence westwardly, along the extended line $b-c$, to c' . Snyder is clearly of this opinion, for he states:¹⁵ “The court plainly intimates an intention not to restrict this dip right in any manner within common-law principles. But that, since the junior locator, the Last Chance, owns it all within its own end lines, except for the claim of the senior locator, the New York, when those rights [the New York's] have all been satisfied, it [the Last Chance] owns the vein beyond the uttermost plane of interruption, to endless depths.”

It is not clear, however, that Lindley is of the same opinion as Snyder. It is true that on page 650 (Figure 31), in seeking to illustrate the principle enunciated by the court in the Del Monte case as to surface conflicts, Lindley draws a diagram which allows, to a junior locator, extralateral rights to all of so much of the

sideration of the series of decisions handed down by the secretary of the interior . . . that the rule announced by the supreme court of the United States in the Del Monte case . . . did not in terms purport to decide anything more than that a junior locator might, for the purpose of defining an extralateral right not secured by prior location, place his end-lines upon the senior claim. The land department permits the laying of such lines entirely across the senior claim, not only for this purpose, but for the purpose of acquiring surfaces not covered by the older location. . . . We do not conceive that there is any wrong done to anyone by the adoption of this rule.” This rule seems to be a perfectly proper and logical development of the doctrine of the Del Monte case: it is to be observed, however, that it has no association with the proposition under consideration.

¹⁴ P. 85.

¹⁵ P. 704.

vein as apexes between his end lines, notwithstanding that part of the apex so included is on a surface belonging to a senior locator.¹⁶ The main question considered by Lindley on page 650, however, is not the question under discussion. The question under discussion is formulated by Lindley, as follows:¹⁷ "Where two claimants locate upon the same vein, . . . a part of the apex being within a surface common to both claims, . . . the junior locator, his location . . . being such as would confer an extralateral right in the absence of any conflict, is entitled to all that part of the vein in depth lying between his extended end-line planes, less the segment which legally falls to the senior locator."¹⁸ And, after considerable discussion of this formula, Lindley reaches the following conclusion (conclusion 9, p. 1077): "Where the extralateral-right planes of two locations conflict, each having a part of the apex of the vein within their respective surface boundaries, the junior locator takes such segment of the vein within his extralateral bounding planes as remains after satisfying the extralateral right of the prior grant." It is to be noticed that no statement is here made as to where the extralateral bounding planes are to be applied, and therefore that Lindley's

¹⁶ Lindley's Figure 31 would as well have illustrated his text had an extralateral-right plane been drawn, parallel to the end lines, from the point where the apex departs from the surface of location D and enters the surface of location B, and an extralateral-right plane so drawn would have accurately illustrated the exact holding of the *Del Monte* case.

¹⁷ P. 1058.

¹⁸ It seems clear that Lindley did not mean the application of this formula to cover a case where the junior location included no part of the apex whatever which had not been previously located. It is certain that no court would apply this doctrine so far. Thus, in the *Copper Trust* case, 65 Pac. 1025 (discussed below), the court said: "Suppose, for instance, there had been no vacant surface within the boundaries of the *Copper Trust* location, would it be contended for a moment that O'Connor has any rights whatever under it? A discovery of a vein upon unoccupied land is absolutely essential to the validity of a location. There must be a surface right. Without this no right to the lode can be established. The statutes do not authorize the land department to convey a lode independently of the surface ground connected with and containing or overlying it. . . . Neither this section [§ 2322, U. S. Stats.] nor any other provision of the statute authorizes or provides a way for the appropriation of any portion of a lode without some portion of the surface through which it may be reached." It is true that, in *Del Monte v. New York, Hallet, J.*, in the lower court, said: "I think that the lines of a claim may be located wholly or partly upon other territory, — that is, territory which is not open to location, — for the purpose of determining the extralateral questions" (not reported: quoted from Lindley, p. 657). Clearly, however, Mr. Justice Hallet meant only that any one line might be wholly laid upon the surface of a senior location, not that all the lines of a junior location might be so laid.

conclusion, exactly as stated, is sound, but leaves the question unanswered.

The two Stemwinder cases¹⁹ and the Copper Trust case²⁰ are discussed at length by Lindley²¹ in connection with the holding of the Del Monte case, and so need no extended discussion here. It should be remarked, however, that in the first Stemwinder case the attention of the court²² seems to have been directed merely to a question as to whether or not the extralateral rights of the owner of the Stemwinder — a junior location having its northerly end line laid upon the surface of a senior location — should be bounded by a plane drawn through the southerly boundary of the overlapped senior location; while in the second Stemwinder case, heard by the same court, the main question was as to the interruption of an extralateral right by a conflicting senior extralateral right. It is true that, in both cases, the court held that the northerly extralateral-right plane of the Stemwinder should be drawn through its northerly end line, notwithstanding that such end line was laid upon a senior surface, but in neither case does the attention of the court appear to have been specifically directed to the exact holding of the Del Monte case, no question having been raised, apparently, as to whether or not the northerly extralateral-right plane of the Stemwinder might not better be drawn, parallel with the end lines, from the point where the apex departed, on the north, from the Stemwinder surface.

In the Copper Trust case, on the other hand, the exact question under discussion was specifically raised and squarely met. The court held that the owner of the Copper Trust location had extralateral rights to only so much of the vein on the dip as he had on the apex (that is, previously unlocated apex), saying: "it was distinctly held [in the Del Monte case] that any of the lines of a junior location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location. . . . Nowhere in the opinion do we find any support for the contention that the junior locator acquires any right to any portion of a vein beneath the surface of the senior location by laying his lines upon, over,

¹⁹ Bunker Hill, etc., Co. v. Empire State, etc., Co., 109 Fed. 538, 131 Fed. 591.

²⁰ State *ex rel.* Anaconda, etc., Co. v. District Court, 25 Mont. 504, 65 Pac. 1020.

²¹ § 596.

²² Circuit Court of Appeals, 9th circuit.

or across its surface, except that by this means he may secure parallelism of his end lines, and, through this parallelism, extralateral rights to the extent of the length of the vein found within the surface for which he may receive a patent. . . . In the Del Monte Case the extralateral rights claimed by the Last Chance were asserted as to that portion of the vein the apex of which was found within that part of the surface of the Last Chance not covered by any previous location. The case goes only to the extent of deciding that, as the Last Chance had parallel end lines, and the vein passed through them, it had extralateral rights as to that portion of the apex not covered by either of the other conflicting locations."²³

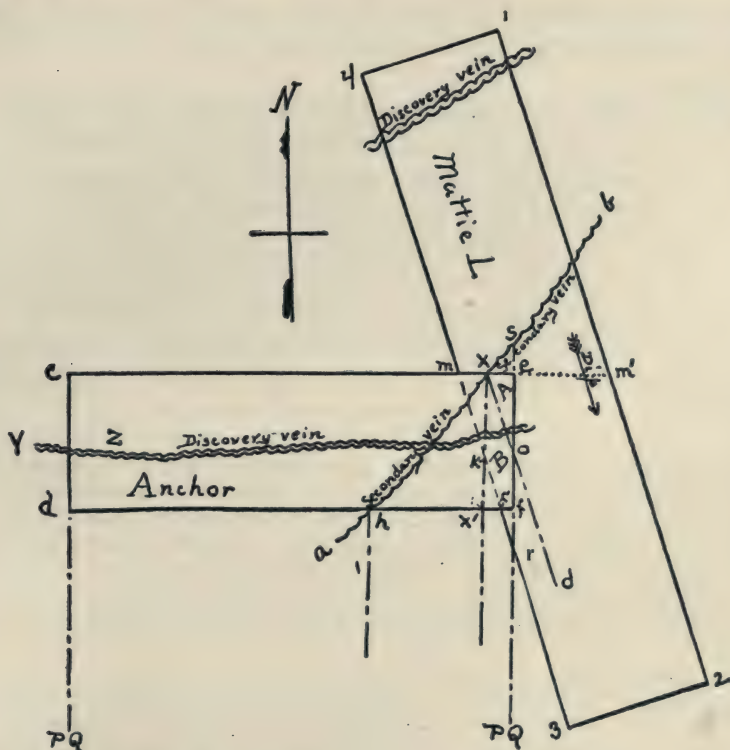
In *Jefferson M. Co. v. Anchoria, etc., Co.*²⁴ an excellent opportunity was afforded for discussion of the question under consideration. The facts in the case are illustrated by the following plat:²⁵

²³ 65 Pac. 1024-1025.

²⁴ 32 Col. 176; 75 Pac. 1070; 64 L. R. A. 925.

²⁵ NOTE ON *JEFFERSON M. CO. v. ANCHORIA, ETC., CO.*, 32 COL. 176: On the plat which accompanies the opinion in this case, the apex of the discovery vein of the Anchor location is not shown, as here, to have extended, on its easterly course, beyond its point of intersection with the secondary vein. On the other hand, from statements contained in the opinion, it appears that the apex of the discovery vein of the Anchor did in fact cross both end lines of that location, as shown on the plat here given; and that the decision of the court was rendered in contemplation of this fact is shown by its expressed willingness to apply, to this case, the doctrine of *Walrath v. Champion*, 171 U. S. 293—that is, notwithstanding the fact that the apex of the secondary vein departed from the surface territory before reaching the end line *e-f*, the court was willing to grant rights on the dip of such secondary vein up to such end line, on the ground that such end line was crossed by the discovery apex, and that rights on the secondary vein should be continuous with rights on the discovery vein.

In this connection it is submitted that Lindley's views as to dip rights on secondary veins (Lindley, §§ 593-594), though he attempts to reconcile *Walrath v. Champion*, are in fact in opposition to the doctrine of that case. If it be permitted to epigrammatize both the doctrine of *Walrath v. Champion* and Lindley's views, the former may be stated thus—so much of the secondary vein as there is of the discovery apex; while the latter may be stated thus—so much of the secondary vein as there is of the secondary apex. Or, to state Lindley's views more fully, he holds that though the discovery apex crosses both end lines, still rights on the dip of the secondary vein must be limited by the extent of the apex of such secondary vein within the surface territory, that is, that the dip-right bounding planes applicable to the secondary vein must be drawn, parallel with the end lines, from the points of departure of the secondary apex from the surface territory. In other words, Lindley measures the extent of the dip rights on a secondary vein by the length of the secondary apex within the surface boundaries, irrespective of the length of the discovery apex; while the court in *Walrath v. Champion* measured the extent of the dip rights on a secondary vein by the length of the discovery apex, irrespective of the length of the secondary



The Anchor was the senior location. The ore bodies in dispute were on the dip of the vein $a-b$, and lay under the surface of the

apex. It may be observed that Lindley's views are in conformity with, and that the doctrine of *Walrath v. Champion* denies, the principle that, save in so far as a discovery vein serves as a basis of location, no distinction is to be drawn between a discovery vein and a secondary vein, both being of equal dignity.

Now it is clear that if Lindley's views, which are supported by the decision of the Circuit Court of Appeals in *Mont. M. Co., etc., v. St. Louis, etc., Co.*, 102 Fed. 430, and 104 Fed. 669, be accepted as correct, the rights on the secondary vein in the Anchor would have been the same whether the discovery vein terminated as indicated on the plat accompanying the opinion, or as indicated on the plat given herewith. That is, if Lindley's views be applied, it appears that if the discovery apex crossed the end line $c-f$, as it did in fact, the bounding plane to limit the rights on such secondary vein must nevertheless be drawn from the point x ; while if it be supposed that the discovery apex terminated before reaching the end line $c-f$ (namely, at its intersection with the secondary vein), such bounding plane must still be drawn from the same point.

It is true that Lindley, in expressing his views, did not have in contemplation a state of facts such as that presented by the supposition that the discovery apex in the Anchor terminated at its intersection with the secondary vein, but such a state of facts was presented to the court in *Ajax Gold M. Co. v. Hilkey*, 31 Colo. 131,

Anchor, within the parallelogram $x-x'-f-e$, less the triangle $k-n-x$.¹ The decision awarded all the ore bodies in dispute to the owner of the Anchor.

It is clear that the lines 4-3 and 1-2, being the lines crossed by the discovery vein of the Mattie L, are the true end lines of that location, and that, for a similar reason, the lines $c-d$ and $e-f$ are the true end lines of the Anchor. It is clear, furthermore, that in considering what dip rights the owner of the Mattie L had on the vein $a-b$ —provided it had any rights thereon at all²⁶—the secondary character of that vein is immaterial, for, since it crossed both the true end lines of the location, the bounding planes limiting the dip rights will be the same as if it had been a discovery vein.²⁷

72 Pac. 447, and the holding in that case was in conformity with the statement made above. That is, the doctrine of the Ajax case was specifically to the effect that if the point at which a discovery apex departs from the surface territory is short of the point at which a secondary apex so departs, in such a case the dip rights on the secondary vein are not to be limited by the bounding plane limiting the dip rights on the discovery vein, but are to be limited only by the length of the secondary apex within the surface territory. It is clear that this holding was in exact conformity with Lindley's views.

It is curious to note that *Ajax v. Hilkey* was decided by the same court which decided *Jefferson v. Anchoria*, the case under discussion, both opinions being written by Campbell, C. J. In *Jefferson v. Anchoria* Mr. Justice Campbell intimates that his therein expressed affirmance of the doctrine of *Walrath v. Champion* is to be reconciled with his decision in *Ajax v. Hilkey*, apparently on the ground of the difference in the facts of the two cases, namely, that in *Walrath v. Champion* the point where the secondary apex departed from the surface territory was short of the point where the discovery apex so departed, while in *Ajax v. Hilkey* the contrary was true. It is submitted, however, that the *Ajax* case may not be reconciled with *Walrath v. Champion*, for the holding of the *Ajax* case (namely, that ownership of the secondary apex gives dip rights on the secondary vein which are not to be limited by the same bounding planes which limit the dip rights on the discovery vein, the discovery apex being shorter than the secondary apex, can only be based on the theory that the extent of the dip rights on a secondary vein is dependent on the length of the secondary apex; while the holding of *Walrath v. Champion* (namely, that notwithstanding a partial lack of apex, dip rights on a secondary vein may, if the discovery apex be longer than the secondary apex, be coterminous with the dip rights on the discovery vein) can only be based on the theory that the extent of the dip rights on a secondary vein is dependent on the length of the discovery apex.

²⁶ See last paragraph of footnote No. 27.

²⁷ "One thing seems quite certain—the law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to which one was discovered first,—that is, which vein was the basis of the location,—and there exists to this extent a distinction between the two classes of veins. In other respects they are of equal dignity" (Lindley, 1051-1052). In other words, where two veins are found to apex within the surface territory of one location, no distinction is to be drawn between them, but both are to be treated as of equal dignity—unless a

No question was raised as to the indubitable right of the owner of the Anchor to the ore to the west of the bounding plane $x-x'$,

question arises as to some point concerning, or dependent on, the drawing or character of the boundaries of the location, in which event, but in which event only, an inquiry as to which is the discovery vein (that is, as to which vein served as the basis of location) becomes of moment. In the case in hand, if the owner of the Mattie L had any rights whatever on the vein $a-b$, such rights must be determined with reference to the end lines 4-3 and 1-2. And since the same lines would still be end lines, and so would still determine those rights, if the vein $a-b$ were considered as a discovery vein, any inquiry as to whether said vein was a discovery or a secondary vein would be, in this connection, of no moment.

In the opinion, in the case in hand, it was stated (64 L. R. A. 928): "It is to be observed again that $a-b$ is not the discovery vein of either location, but the parties seem to agree that, under the facts of this case, their respective rights thereto, whether intra-liminal or extralateral, are not different from what they would be were both locations based upon it as such."

This statement, in so far as it relates to the Anchor location, is very puzzling. On the one hand, it is clear that the vein $a-b$ cannot be considered as the vein with reference to which the Anchor was located without establishing the lines $c-e$ and $d-f$, both of which were crossed by said vein, as the end lines of the Anchor location. On the other hand, it is equally clear that it was not the intendment of the agreement to establish said lines as end lines, for so to have done would have been to grant, to the owner of the Anchor, dip rights on the vein $a-b$, which would indisputably have included not only all the ore in controversy but also all other ore, under the surface of the Mattie L location and beyond, which might have been included between vertical planes drawn through the extended lines $c-e$ and $d-f$. It is clearly apparent, therefore, that the agreement of the parties as stated in the opinion of the court, cannot be taken literally, and that, in considering this case, the vein $a-b$, though it may be considered as if it were the discovery vein of the Mattie L, may not be considered otherwise than as the secondary vein of the Anchor.

But though the form of the agreement of the parties is inexact, consideration makes its intendment clear. On the one hand, it is evident that counsel for the owner of the Anchor were willing to base their claim of right to the ore in controversy on the supposition that the vein $a-b$ was a discovery vein. On the other hand, it is evident that counsel did not mean to alter the true character of the line $e-f$ as an end line. Now, in order both to consider the vein $a-b$ as the discovery vein of the Anchor, and still to retain the line $e-f$ as an end line, it would be necessary incidentally, though only incidentally of course, to reconstruct the course of the apex. Thus, for the purpose of giving effect to the agreement of the parties, the apex of the vein $a-b$ on its westerly course might be assumed to cross, let us say, the end line $c-d$. As has been pointed out, said apex may not be considered, for the purpose in hand, as crossing both the lines $c-e$ and $d-f$, or the line $c-e$ and no other line. It may not be assumed not to cross, on its easterly course, the line $c-e$, for every question in the case hangs upon the fact that, on its easterly course, it does cross the line $c-e$, at x . The only assumption that can be made, therefore, is that the vein $a-b$, on its westerly course, either crosses the line $c-e$ a second time or crosses the end line $c-d$.

Thus it becomes clear that the intendment of the agreement of the parties was to the effect that though the vein $a-b$ was in fact a secondary vein, yet the rights of the owner of the Anchor thereon, in reference to the ore in controversy, were not different from what they would have been if said vein had been a discovery vein having such a course on its westerly strike that the rights thereon might have been determined with

drawn, parallel with the end lines, from the point where the apex of the vein departed from the surface territory of the Anchor.²⁸ No question was raised, either, as to the right of the owner of the Mattie L to the ore under the surfaces of the triangles $r-n-f$ and $s-x-e$, though it is submitted that, under the doctrine of Walrath v. Champion, the owner of the Anchor might have claimed a right not only to sink on the vein, into the territory $r-n-f$, but even to rise, up the dip of the vein, into the territory $s-x-e$ — excepting the surface.

The only territory remaining for consideration is that indicated

reference to the end line $e-f$ as an end line — that is, the agreement of the parties was merely an affirmation of the soundness of the principle that, apart from questions concerning boundaries, an inquiry as to whether a vein be secondary or discovery is of no moment. Or, more specifically, counsel for the owner of the Anchor claimed no greater rights on the vein $a-b$, because of its secondary character, than would have resulted to them had the vein $a-b$ been a discovery vein crossing, on its westerly course, let us say the line $c-d$.

Now let us consider the effect of this agreement. On the one hand, if the vein $a-b$ be considered as a discovery vein (having such a course on its westerly strike that the line $e-f$ may be treated as an end line), in such case the owner of the Anchor must clearly be denied all dip rights on said vein to the east of the plane $x-x'$ (Lindley, § 591), and all common law rights thereon to the east of the plane $x-o'$ (Del Monte case). On the other hand, if the vein $a-b$ be considered as a secondary vein (in which case its course on its westerly strike is immaterial), in such case a doubt as to the rights to the ore within the triangle $x-o-e$ would be raised in favor of the owner of the Anchor by the doctrine of Walrath v. Champion, for the application of that doctrine would give rights on the secondary vein conterminous with the rights on the discovery vein $Y-Z$, that is, up to the end line $e-f$, and including the triangle $x-o-e$. It is true that it appears from the opinion of the court that the owner of the Anchor in fact laid claim to all the ore within the parallelogram $x-x'-f-e$, including the triangle $x-o-e$, but the agreement to consider the vein $a-b$ as the discovery vein of the Anchor was, in effect, an abandonment of that claim, and a waiver of the doctrine of Walrath v. Champion.

It is to be observed, further, that the agreement to consider the vein $a-b$ as the discovery vein of the Mattie L was, in effect, an abandonment of another contention made by the owner of the Anchor. Such contention appears to have been to the effect that the owner of the Mattie L had no right whatever to the vein $a-b$, because ownership of this vein (in the Mattie L) could be predicated only on ownership of the discovery vein to the north, — the vein with reference to which the boundaries of the Mattie L must be determined, — and because the apex of the vein $a-b$ lay more than three hundred feet distant from the course of the apex of such discovery vein, and so could not be included within that extent of surface territory on each side of the lode line, which, under the statute, may be patented as one location. This contention, of course, was based wholly upon the consideration of the vein $a-b$ as a secondary vein. The court did not pass upon this contention.

²⁸ The court saying: "The owner of that claim . . . certainly owns all the mineral of such vein within planes extended vertically downwards coincident with its end lines and side lines to the extent at least of the length of the apex found within its surface boundaries." 64 L. R. A. 932.

on the plat by $x-e-o-f-n-k$. The owner of the Anchor could not base a claim to the ore within this territory upon ownership of an apex,²⁹ for its apex rights were bounded on the east by the plane $x-x'$. Being the owner of the senior location, however, and therefore the owner of all surfaces in conflict with the junior location, it could claim a common-law right to all ore within this territory to which the junior locator had no apex rights. Apparently, then, the whole controversy should have turned, as in the Copper Trust case, upon a determination of a question as to whether or not the junior locator had so located the apex of the vein as to give him rights on the dip thereof within any part of the territory under consideration.³⁰

The territory $x-e-o-f-n-k$ is divisible into two parts—the triangle A, and the pentagon B. Both the triangle A and the pentagon B, it is to be observed, are included within the territory of surface conflict of the two locations, yet they are to be distinguished.

The triangle A lies to the east of a bounding plane ($x-o-o'$) which may be drawn, parallel with the end lines of the Mattie L, from the point where the apex departs, on its westerly course, from the surface territory of that location. That is, the owner of the Mattie L is the undisputed owner of the apex to the east of the point x , wherefore, under the rule that a junior locator on the apex, provided his location is regular, is entitled to so much on the dip as he has on the apex, even though the vein dips under the surface of a senior location, the owner of the Mattie L would seem to have been clearly entitled to follow the dip of the vein, within and without the territory underlying his surface, everywhere between his dip-right bounding planes, including the triangle A.

Toward the end of the opinion the court said: "The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, c, f, e, x , to each belonging such part of the vein as it has the apex of, but, if it had been, there are not sufficient *data* in the record to show what portion, or how much, each party is entitled to, even if we should hold that the Mattie L. owns such portion of the ores within that parallelogram as it has the apex of easterly of x . The case has been submitted rather upon

²⁹ Except under the doctrine of *Walrath v. Champion*, 171 U. S. 293.

³⁰ The line of reasoning actually followed by the court will be discussed in Part II of this paper, — Intralimital Rights in Lode Locations.

the proposition that each party owns all the ores found within this parallelogram." Thus it appears that the court proceeded upon the ground that since no distinction had been drawn by counsel between the triangle A and the pentagon B, these two territories should be considered as one, and that since, under any circumstances, the owner of the Mattie L could be entitled to only a small part of such territory, the whole thereof should be awarded to the owner of the Anchor. Whether or not the court was justified, since each party demanded the whole territory, in refusing to consider, of its own initiative, the respective rights of the parties therein, is a question of no importance in this discussion, but the fact that the court expressed a willingness to have considered a distinction between the territories herein indicated as the triangle A and the pentagon B, had such a distinction been made, intimating that it might have granted apex rights in the former, while denying them in the latter, to the owner of the Mattie L, is very significant.

The pentagon B lies to the east of $x-x'$, the easterly dip-right bounding plane of the Anchor on the vein $a-b$. Except under the doctrine of *Walrath v. Champion*,³¹ therefore, the owner of the Anchor might not claim apex rights to the ore within the pentagon B. Now, as has been stated, since the owner of the Anchor had no apex rights on the vein $a-b$, to the east of the plane $x-x'$, it follows that it might claim the ore within the pentagon B only on the ground that it had a common law right thereto, being the owner of the surface. This common law right, of course, could be operative only in the absence of an apex right in the owner of the junior location. Now the only theory on which the owner of the Mattie L might claim apex rights within the pentagon B, would be that the effect of the decision in the Del Monte case is that a junior locator, by laying his lines across a senior surface, thereby acquires apex rights, secondary only to the apex rights of a senior locator, to so much of the vein as apexes within his boundaries, notwithstanding that part of the apex so included outcrops on a surface belonging to a senior locator. In other words, under the theory as authority for which the Del Monte case has been cited, the owner of the Mattie L might have claimed apex rights on the vein $a-b$, to the west of the point x , on the ground that its boundaries included a part of the apex to the west of the

³¹ *Supra*.

point x —therefore that the owner of the Mattie L had apex rights everywhere to the east of the line 4-3, save where the superior apex rights of the owner of the Anchor took precedence; that the apex rights of the owner of the Anchor were bounded on the east by the plane $x-x'$ —therefore that the owner of the Mattie L had apex rights everywhere to the east of the planes $x-x'$ and 4-3. It appears from the opinion that this claim was virtually made by counsel for the Mattie L as follows: "The second contention of appellant is that . . . the owner of the Anchor . . . may follow the secondary vein, $a-b$, between vertical planes drawn parallel to the planes of the end lines, . . . at any point west of x , but . . . the owner of the Mattie L. claim . . . has the right to follow such vein on its dip between vertical planes drawn parallel to and coincident with the legal end lines (that is, the located side lines) of the Mattie L. location, and this includes the vein under the surface of the Anchor within" the territory in question. Commenting on this claim, the court said: "counsel virtually asks to have the principle of that rule [the doctrine of 'extralateral' (that is, apex) rights] applied to the facts. That doctrine does not fit the facts of the case, for the legal question is one strictly of intraliminal [that is, common-law] rights." Thus the court denied apex rights to the owner of the Mattie L within the pentagon B, and to that extent this case denies the doctrine for which the Del Monte case has been cited as authority, and limits the effect of the Del Monte decision to the exact holding of the court. This being understood—that is, it being understood that all claims of apex rights within the pentagon B were disallowed by the court—the decision that the sole question in the case was one of "intraliminal" rights, wherefore the senior locator of the surface of conflict must prevail, becomes clear and of full force.

It is true that this case might have been similarly decided under the doctrine of *Walrath v. Champion*, but inasmuch as counsel for the Anchor virtually waived all claims of right under the rule of that case,³² and inasmuch as the court, though it incidentally expressed its willingness to comply with that rule,³³ did not apply it, but rendered the decision on other grounds, the force of the decision as a refusal to extend the doctrine of the Del Monte case is not weakened.

³² See next to last paragraph of footnote No. 27.

³³ The court said: "if this case demanded the application of that rule it would be our duty to follow it . . . notwithstanding the adverse criticism of the decision by the learned author of *Lindley on Mines*." 64 L. R. A. 931.

But if it were granted that the holding in *Jefferson v. Anchoria* is not of great force to restrict the extension of the doctrine of the *Del Monte* case, at least the argument of the Montana court, in the *Copper Trust* case,³⁴ is, and there seems to be no case which definitely establishes the extension of that doctrine. It is true that the two *Stemwinder* cases and the *Hidee* case³⁵ apparently favor such an extension. It is true, furthermore, that *Walrath v. Champion* would seem to furnish authority, by analogy, for such an extension, for in that case the Supreme Court seems to have decided that, as to a secondary vein, a locator may follow its dip between the planes of his end lines, even though the length of the apex of the secondary vein within his territory be less than the distance between his end lines, in other words, that, as to a secondary vein, a locator may have more on the dip than he has on the apex. But if that be indeed the holding of the court in *Walrath v. Champion*, and this is energetically denied by Lindley, it has at least been shaken by the almost universal adverse criticism of jurists, and by the fact that it was not followed, in a later decision by the Circuit Court of Appeals, in *Montana M. Co. Ltd. v. St. Louis M. & M. Co.*³⁶ It may fairly be stated, therefore, that the extension of the doctrine of the *Del Monte* case has not been definitely established by the cases.³⁷ The writer has not discovered any case, other than those herein above cited, wherein there is any valuable discussion directly bearing on the question under consideration—it being submitted that those cases which treat of the apex rights to be acquired by the laying of lines across the surfaces of senior agricultural patents, or other lands not located as lode claims, are not in point.³⁸

³⁴ *Supra*.

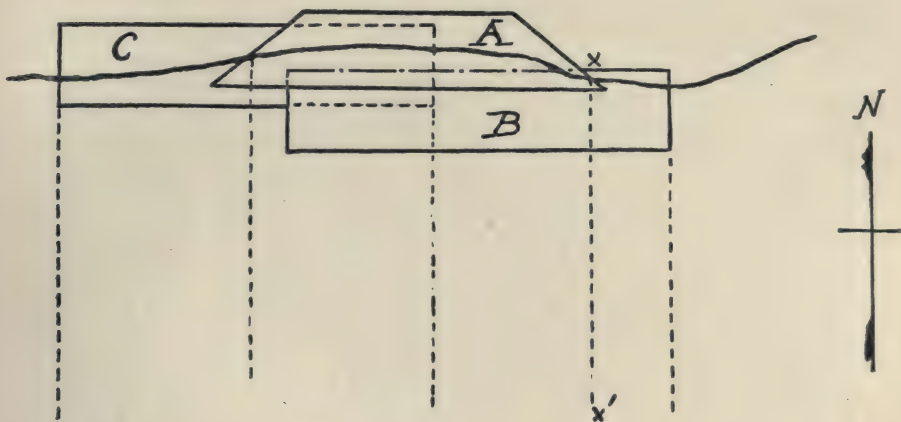
³⁵ *In re Hidee Gold M. Co.*, 30 L. D. 420.

³⁶ 102 Fed. 430, and 104 Fed. 664. Lindley, 1048, states as follows: "In the preceding section we have fully explained what we understand to be the proper interpretation of the decision of the circuit court of appeals in the *Walrath* case, from which it appears that no such deduction as claimed can be made. The fact that the same court in the *St. Louis* case did not apply any such doctrine as that above suggested is a circumstance of the highest corroborative value supporting our view that the decision in the *Walrath* case was never intended to sanction any such doctrine. If it had, it would have followed it, and it would have been in duty bound to do so, as it had received the approval of the supreme court of the United States. As it is, the court of appeals cites the *Walrath* case as authority for its decision in the *St. Louis* case, as it undoubtedly is."

³⁷ "It is better that the principle established should be certain and definite, even if it is not based upon incontrovertible logic or the perfection of human reasoning." Lindley, 1078.

³⁸ See above, last paragraph of footnote 6.

The reasoning on which the court in the Del Monte case based its decision was, in brief, that surface conflicts, because of many natural as well as practical causes, are in no wise to be avoided, and are not only not forbidden but are even contemplated by the statute, wherefore, since a senior locator is deprived of no property right by having the lines of a junior location laid upon his surface, there is no reason why a junior locator should not make a peaceable entry for that purpose, thereby paralleling his end lines and securing extralateral rights, of which he would otherwise be deprived, to so much of the vein as is referable to that portion of the apex which lies within his own undisputed territory. That the court did not believe that this reasoning would also apply necessarily to establish the further proposition for which the case has since been cited as authority (namely, that there is no reason why a junior locator may not lay his end lines across a senior surface for the purpose of securing apex rights referable to that portion of the apex which lies within the senior location), is evidenced by the statement of the court that that proposition was one reserved "for further consideration."



The argument of the court to the effect that A, a senior locator, is in no wise injured by permitting C, a junior locator, to draw an end line upon the senior location for the purpose of securing such extralateral rights as are not incident to ownership of A's location, does not necessarily contemplate the exercise by C of extralateral rights greater than may be referred to that portion of the apex which lies within his own undisputed territory—otherwise the

question of the court,³⁹ "Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim?", might easily be answered if B, a locator on the dip, senior to C, whose territory is not subject to the extralateral rights referable to C's part of the apex, might be deprived of his common law rights. This is illustrated by the diagram on page 285.

Referring to this diagram, it is clear that A, because of the wide divergence of his end lines, can have no extralateral rights. If, to avoid any question as to the validity of B's location, it be supposed that a part of the apex lies within its surface boundaries, it is equally clear that B, before any location made by C, had a common law right to the ore under his surface, to the west of the plane $x-x'$, for, whatever the nature of a common-law right, at least it must become a vested right to the ore to which it is applicable after every part of the apex to which such ore can be referred has been so located as not to carry dip rights to such ore. Can C, then, by a subsequent location of an apex already located, deprive B of his vested common-law right? Surely not, if the court in the Del Monte case was right when it stated: ⁴⁰ "The location, the mere making of a claim, works no injury to one who has acquired prior rights."⁴¹

To the argument that some method of appropriating the whole of a vein must be devised where the location of the apex has been of such a nature or fashion as to leave a certain portion of the vein unappropriated on its dip, it may be answered that this may properly be done by making locations over the unappropriated portions of the dip. It may be urged that the ownership of some portion of an apex is essential to the validity of the location, and that an apexless location over the dip is therefore invalid, but it is submitted that this is error. The statute does not require the discovery of an apex, but the discovery of a vein, — "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."⁴² It is not submitted that the discovery of a vein, on its dip, will validate an apexless

³⁹ P. 84.

⁴⁰ P. 74.

⁴¹ A common law right to a given body of ore, prior to location, by another, of an apex to which such ore can be referred, can, at most, be only an inchoate right subject to defeasance upon condition that such apex be so located as to carry dip rights to such ore.

⁴² § 2320.

location⁴³ if the part of the vein so discovered is referable to some part of the apex, but that, if the apex has been so located that that part of the dip of the vein which has been discovered in the apexless location cannot be referred to any part of the apex (that is, does not lie between the extralateral-right planes which may be applied to any location on the apex), there would seem to be no reason why such a discovery of valuable mineral-bearing rock in place should not be sufficient to validate the location.⁴⁴ There have been many decisions granting, to the owners of apparently apexless locations, the right to such ore under their surfaces as is not subject to the extralateral rights of locations on the apex—as in *Del Monte v. New York*, where it was expressly held that, as against the owner of the New York, the owner of the Del Monte had a right to the ore under its surface, north of the line $r-z'$; also as in the *Copper Trust* case; and the *Horseshoe* case.⁴⁵ It may be that, in each of such cases, the location on the dip contained some portion of some apex other than the apex of the vein in question, but, if so, it does not so appear in the opinions.

To the objection that the making of apexless locations over the dip would be a cumbersome process, and might be entirely impracticable in cases where the dip of the vein is so sharp as to acquire much depth within a short distance from its apex, it may be answered first, in the words of Lindley used in another connection,⁴⁶ that this is only “the suggestion of a mere inconvenience to the

⁴³ No reference is had, of course, to tunnel locations.

⁴⁴ Lindley's statement (pp. 532–533), “No lode location is valid unless it includes, to some extent at least, . . . the top, or apex, of a discovered vein,” is modified by the concluding clause, “at least as against a subsequent locator properly inclosing such apex within his surface boundaries.” Lindley states further: “It is possible that under some circumstances a location overlying the dip of a vein may be valid to the extent of whatever may be found within the vertical bounding planes” (footnote, p. 533). And again (p. 661): “The existing laws require that the top, or apex, of the vein, to some extent at least, should be found within the limits of the location, as defined on the surface, at least as a condition precedent to the enjoyment of the extralateral right. We do not feel justified in asserting that a location on the dip of the vein which does not include any part of the apex is under all circumstances void. It might happen that the true apex of a vein is embraced within a prior grant of such a character as to prevent the owner from following the vein on its downward course out of his vertical boundaries. . . . Under such conditions it is quite possible that by a surface location not covering the true apex the locator might acquire the exclusive right to the surface and the underlying vein as against all persons save those who fortuitously covered the true apex in such a way as to confer upon them the right to laterally pursue the vein underneath the surface of the claim overlying the dip.”

⁴⁵ *Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 196.

⁴⁶ P. 1068.

junior locator and not a limitation upon his title"; second, that this method has been found to be practicable in Mexico; and third, that this method could hardly be so cumbersome as to relocate the same part of the apex again and again for the purpose of securing rights to ore under surfaces at long distances.

The exact holding of the court in the Del Monte case, and the doctrine for which that case has been cited as authority, are two propositions of entirely different natures. The first merely affords a means of acquiring extralateral rights, where otherwise there would be none, based on ownership of a previously unlocated part of an apex; the second seeks to give double extralateral rights, or extralateral rights in two different directions from one and the same part of an apex. The second proposition, as has hereinabove been stated in a different connection,⁴⁷ seeks to give to one who has not located, and who is not the owner of, a given part of an apex, an extralateral right which can properly be based only on ownership of such part of the apex — it seeks to give, to A, extralateral rights referable to a portion of an apex which is not included within A's territory, notwithstanding that such portion of the apex has previously been located by B, simply because B follows the dip of the vein in a direction different from that followed by A. The same reasoning that would disallow extralateral rights to a junior locator on any part of a vein which does not apex at all in any part of his undisputed territory would seem with equal certainty to disallow him extralateral rights on so much of the vein as apexes within territory previously located. If it be granted that the right to pursue a vein on its dip must always be predicated on ownership of an apex, how can a right on the dip of a vein be granted to one who does not own a corresponding part of the apex? Would not this be to violate the elementary rule that a locator can have no more of the dip than he has of the apex? It would seem that when a given part of an apex has once been duly located, it is not, except in case of abandonment, subject to relocation for any purpose whatever. The proposition for which the Del Monte case has been cited as authority, therefore, virtually seeks to grant extralateral rights without ownership of an apex, and so denies the statute, and cannot be law.

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NEW YORK.

[*To be continued.*]

⁴⁷ See above, footnote 6.

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FEDERAL JURISDICTION OF SUIT AGAINST "STATE DISPENSARY COMMISSION." — The many cases which have decided whether a suit brought nominally against state officials is really against the state and hence not cognizable by the federal¹ or other² courts, reduce to no satisfactory general principles,³ but at least afford arguments by analogy to a new set of facts, such as that recently presented in South Carolina. The legislature, having abolished the state monopoly of the sale of liquor, authorized the appointment of a commission whose duty it should be to close out the business of the state dispensary, to sell the personalty, determine and discharge the liabilities, and pay the surplus to the state treasurer. A creditor of the dispensary filed a bill in the federal court against the commission, asking for a receivership, injunction, and accounting as to the funds in its hands. The Circuit Court of Appeals, contrary to the decision of the state appellate tribunal,⁴ sustained the jurisdiction of the Circuit Court, on the ground that the state, having assigned for the benefit of creditors, was not a necessary party-defendant, or so substantially interested as to clothe the assignee with immunity from suit. *Murray v. Wilson Distilling Co.*, 164 Fed. 1 (C. C. A., Fourth Circ.). It is believed that the creation of the commission was not in effect such an assignment,⁵ but rather the appointment of agents who would not take title; that, granted the state did assign, it nevertheless should have been joined as an assignor entitled to the surplus of the proceeds,⁶ and therefore jurisdiction failed for defect of parties;⁷ and that finally, granted

¹ U. S. Const., Amend. XI.

² *Owen v. State*, 7 Neb. 108.

³ See 20 HARV. L. REV. 245; 21 *Ibid.* 527.

⁴ *State v. Murray*, 60 S. E. 928 (S. C.).

⁵ *Cf. McHose v. Dutton*, 55 Ia. 728.

⁶ *Haughton v. Davis*, 23 Me. 28. *Contra, Wells v. Knox*, 55 Hun (N. Y.) 245. See Story, *Equitable Pleadings*, § 153.

⁷ *Cunningham v. Macon, etc.*, R. Co., 109 U. S. 446.

even that the state was not a necessary party, the court was not justified by the precedents in considering the suit not to be against the state. For it seems to fall on the same side of the line as the cases which hold that a court has no jurisdiction to issue a mandate which virtually enforces the contract of the state,⁸ or compels affirmative action on the part of officials not charged with a clear ministerial duty,⁹ or affects the property of the state in the hands of its agents,¹⁰ or compels payment from the state's funds,¹¹ or imposes a trust on the state's property.¹² On the other hand, this suit seems distinguishable from one against a corporation of which the state is a member,¹³ since here the state has direct ownership of at least the surplus; or from a proceeding to determine the state's interest in a *res* not in its possession;¹⁴ or from an action of ejectment against state officers when the state shows no *prima facie* title.¹⁵ The two chief authorities for the court's position are early cases¹⁶ in the circuit courts, scarcely mentioned in later discussions. Moreover, if an agency, not an assignment, should be found here, the result appears still less tenable.

The court hints at another ground for the decision, namely, that liquor selling is not a governmental function,¹⁷ and hence not intended by the adopters of the Eleventh Amendment to be protected from judicial interference. It is true that dicta have occurred to the effect that a state loses its sovereignty when it steps down into the marketplace.¹⁸ But no case will be found depriving a state of immunity from suit on this ground alone. Doubtless the constitutional prohibition cannot thus be narrowed in application; for it is based on an actual lack of power rather than a theory of government.¹⁹

FORMATION OF A CORPORATION FOR THE PURPOSE OF EFFECTING DIVERSITY OF CITIZENSHIP. — Questions of federal jurisdiction over corporations under the diversity of citizenship clause first arose at a time when the federal judiciary was as anxious to extend its jurisdiction as it is now to restrict it. Although corporations are not citizens within the meaning of the Constitution, this did not prove fatal to federal jurisdiction, since the courts early declared that the stockholders were the real parties in interest and their citizenship the determining factor.¹ The further difficulty, that

⁸ *Louisiana v. Jumel*, 107 U. S. 711.

⁹ *Farmer's Nat'l Bank v. Jones*, 105 Fed. 459.

¹⁰ *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233. *Contra*, *Sinking Fund Com'r's v. No. Bank, etc.*, 1 Metc. (Ky.) 174.

¹¹ *Brown University v. Rhode Island College, etc.*, 56 Fed. 55.

¹² *Lowry v. Com'r's Sinking Fund*, 25 S. C. 416; *Bd. Public Works v. Gannt*, 76 Va. 455. *Contra*, *Preston v. Walsh*, 10 Fed. 315; *Chaffraix v. Bd. Liquidation*, 11 Fed. 638.

¹³ *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. 595.

¹⁴ *U. S. v. Peters*, 5 Cranch (U. S.) 115; *Swasey v. North Carolina R. Co.*, Fed. Cas. No. 13679.

¹⁵ *Tindal v. Wesley*, 167 U. S. 204.

¹⁶ *Chaffraix v. Bd. Liquidation*, *supra*; *Preston v. Walsh*, *supra*.

¹⁷ *Cf. South Carolina v. United States*, 199 U. S. 437. But see *Vance v. Vandercook*, 170 U. S. 438; *State v. Aiken*, 42 S. C. 222.

¹⁸ See *Charleston v. Murray*, 96 U. S. 432; *Bank of United States v. Planter's Bank of Georgia*, 9 Wheat. (U. S.) 904; *The Floyd Acceptances*, 7 Wall. (U. S.) 666.

¹⁹ See *Kawananakoa v. Polyblank*, 205 U. S. 349.

¹ *Bank of U. S. v. Deveaux*, 5 Cranch (U. S.) 61. When the corporate fiction was thus disregarded in an action at law it was in open violation of the principle that that

the stockholders might be citizens of different states was surmounted by the introduction of the artifice, now settled law, that for the purpose of acquiring jurisdiction the stockholders are conclusively presumed to be citizens of the state of incorporation.²

In a recent case the officers and stockholders of a California corporation, in order to bring into the federal courts an action against a California citizen concerning certain land, organized in Nevada a new corporation, to which the old corporation transferred the land, and the stock in the new corporation was issued to the old. The court dismissed the suit as collusive and fraudulent on its jurisdiction. *Miller & Lux v. East Side Canal, etc., Co.*, U. S. Sup. Ct., December 7, 1908. The new corporation is legally a distinct person from the old, and a diversity of citizenship between it and the opposing party *prima facie* exists. But there is a rule that if a litigant is not the real person in interest, but appears merely for purposes of acquiring jurisdiction, there being no diversity between the real parties, the case will be dismissed as an attempted fraud on the court's jurisdiction.³ And the court, having once decided to disregard the corporate entity in order to obtain jurisdiction, is taking no greater step to do so in order to refuse jurisdiction, if collusion or fraud is apparent.

The test for fraud where land is conveyed from one individual to another for the purpose of getting into the federal courts is the reality of the transfer.⁴ No matter what the motive, if the title is really passed, free from any secret trust or agreement to reconvey, the grantee's right to sue or be sued there cannot be denied.⁵ This would seem to apply even where the transferee is a corporation organized for the purpose; for, unless its stockholders are themselves the original owners of the property, there is in fact as well as in law a new owner. But if both grantor and grantee are corporations, with the same officers and stockholders, the grantee having been organized for the collusive purpose, the validity of its ownership is open to attack; for when the veil is drawn it is plain that the person really benefited is the old corporation, that the stockholders control the disposition of the property, and that they can and probably will, effect a reconveyance when the suit terminates. The transaction is no more than a clever and fraudulent scheme to get into the federal courts.⁶ To prevent the perpetration of such a fraud, the court may well feel justified in disregarding the fiction, and in thus extending a well-settled but anomalous rule to cases better fitted for its application than those which established the rule itself. The present decision, therefore, is thoroughly desirable.⁷

The opinion intimates that had the old corporation been dissolved before the suit by the new company was begun, a different decision might have been reached. This seems correct, as the transfer would then appear to be real in fact as well as in law.

step should be taken only in equity (except in the case of *quo warranto* proceedings. See *People v. North River Sugar, etc., Co.*, 121 N. Y. 582).

² *St. Louis & San Francisco Ry. v. James*, 161 U. S. 545, 562.

³ An Act of Congress orders the dismissal of a suit at any stage of the proceedings, when such fraud or collusion appears. 18 Stat. 460, 472.

⁴ *Barney v. Baltimore City*, 6 Wall. (U. S.) 285; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. (U. S.) 70.

⁵ *McDonald v. Smalley*, 1 Pet. (U. S.) 620.

⁶ *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327.

⁷ The suit was in equity, but the court does not notice this distinction, and would probably have reached the same result if the action had been at law. See *Lehigh Mining & Mfg. Co. v. Kelly*, *supra*.

ENFORCEMENT OF ASSESSMENTS IN THE COURTS OF A FOREIGN JURISDICTION. — While, in addition to the ordinary remedy by distress, a personal action can be maintained for general taxes—at least if a statute so provides—it is frequently held in this country that such an action cannot be brought to recover special assessments for local improvements, and that a statute allowing it is unconstitutional.¹ But supposing that such a statute is valid, the question sometimes arises as to its enforcement in a foreign jurisdiction. An English court recently refused, at the suit of an Australian municipality, to enforce a special assessment, though a valid Australian statute gave the municipality a right of action. *Sydney Municipal Council v. Cork*, 25 T. L. R. 6 (Eng., K. B. D., Oct. 15, 1908). There seem to be no prior cases on the point either in England or in this country.² The refusal to allow the action for assessments in a foreign jurisdiction may conceivably be rested on two grounds: first, that the action involves the title to real estate; second, that it is a penal action.

Courts universally refuse to entertain a suit to determine the title to foreign land.³ Such an action is *in rem*, and the courts where the land lies alone have jurisdiction. But the cases go further and hold that an action will not lie for a trespass to foreign land.⁴ So also it has been held that a quasi-contractual action cannot be entertained to enforce a rent charge on land in another jurisdiction.⁵ This is determined, at least in the case of a trespass, as a question of jurisdiction and not merely of venue,⁶ on the ground that the suit involves the question of title to the land. But that should not deprive the court of jurisdiction; for the suit is not *in rem* and the title is only incidentally in issue.⁷ Moreover, courts often do pass on the question of title to foreign land, as in the case of a contract to sell.⁸ In the case of a personal action to collect a tax or an assessment, it is true, the title to land is involved; but it is only incidentally. Hence the court is right in not placing its decision on this ground.

But the courts of one jurisdiction will not enforce the penal laws of another.⁹ Hence, by the weight of authority, the courts of a state will not entertain a suit brought by a foreign state or by a citizen of such a state to enforce a forfeiture, or any other right except specific performance of an obligation, or specific reparation, or compensation.¹⁰ Thus, an action will not lie in a foreign jurisdiction to compel a father to support his bastard child.¹¹ Nor will the courts enforce an obligation imposed by a foreign statute to contribute to the support of a son-in-law.¹² Such matters are regarded as of purely local concern, in the nature of police regulations. This would seem to be clearly so in the case of foreign revenue laws, which are so lightly regarded that contracts made in evasion of them are not regarded as illegal.¹³ The principal case is, therefore, to be supported on this ground.

¹ *Ivanhoe v. Enterprise*, 29 Ore. 245. See note in 35 L. R. A. 58.

² See *Henry v. Sargeant*, 13 N. H. 321, 332.

³ *Roberdeau v. Rous*, 1 Atk. 543.

⁴ *Livingston v. Jefferson*, 1 Brock (U. S.) 203.

⁵ *Whitaker v. Forbes*, 1 C. P. D. 51.

⁶ *British, etc., Co. v. Companhia de Moçambique*, [1893] A. C. 602.

⁷ *Little v. Ry.*, 65 Minn. 48.

⁸ *Penn v. Lord Baltimore*, 1 Ves. Sr. 444.

⁹ *Dicey, Conflict of Laws*, 220.

¹⁰ *O'Reilly v. R. R.*, 16 R. I. 388. But see *Huntington v. Attrill*, 146 U. S. 657. See 6 HARV. L. REV. 154.

¹¹ *Graham v. Monsergh*, 22 Vt. 543.

¹² *De Brimont v. Penniman*, 10 Blatch. (U. S.) 436.

¹³ *Holman v. Johnson*, Cowp. 341.

SPECIAL ASSESSMENTS UNDER THE POLICE POWER WITHOUT REGARD TO BENEFITS.—The levy of special assessments was first asserted to be an exercise of the police power.¹ But when it was desired to levy such assessments for purposes unconnected with the public health and morals, it was necessary to find some new justification. This was sought in the power of eminent domain. Here also arose a difficulty: the power of eminent domain was exercised upon an individual and not upon the community, and, while the benefit was shared by the entire community, the whole burden was cast upon the individual whose property and money were both taken.² Hence, some other justification was rendered necessary for the levying of these assessments. It was found in the taxing power. The entire theory of taxation requires that the taking by the state be in return for protection rendered to the individual. Accordingly, where the tax is special and levied on only a small part of the citizens, they must be compensated by benefits proportionate to the loss sustained by the taking.³

These three powers of the state should not be exclusive. If a taking is compensated in money, it may be an exercise of eminent domain. If it is for the protection of public health or morals, it may be legislative action under the less restricted police power into which the principle of benefits does not enter at all.⁴ For instance, a Wisconsin municipality recently levied an assessment for building a sewer by the front-foot rule. The Wisconsin courts hold this an invalid method of assessment under the taxing power unless it appears that benefits conferred have been regarded.⁵ Yet the Wisconsin Supreme Court allowed it under the police power regardless of any benefits received by the railroad company whose property was assessed. *Chicago, etc. Ry. Co. v. City of Janesville*, 118 N. W. 182 (Wis.).

There has been a decided tendency in many courts to refuse to review the acts of the legislatures in levying these assessments.⁶ In the case of general taxes affecting the whole state there is little to fear from legislative usurpation. There is a natural protection in the fact that the legislature is taxing its constituents. Special assessments, however, relieve the mass of the citizens at the expense of the few, and are for this reason at least not unpopular measures.⁷ The rights of the citizen are therefore subject to serious encroachments if there is no appeal from the legislative decision.⁸ Furthermore, though there may be no express inhibition to the states in the federal Constitution against taking private property for public uses without compensation, such taking was undoubtedly against the whole principle of English liberties and was not due process before the Fourteenth Amendment. The United States Supreme Court considers such taking unconstitutional when it amounts to a complete confiscation of the property assessed.⁹ It is hard to see why incomplete confiscation to any substantial extent should not stand on the same plane.¹⁰

¹ Petition of N. Goddard, 16 Pick. (Mass.) 504.

² *People v. Mayor of Brooklyn*, 4 N. Y. 419.

³ *Illinois Central R. R. Co. v. Decatur*, 147 U. S. 190, 202. See *Canal Trustees v. Chicago*, 12 Ill. 403.

⁴ *Horbach v. Omaha*, 54 Neb. 83; *Cone v. Hartford*, 28 Conn. 363; *Keese v. Denver*, 10 Colo. 112; *Van Wagoner v. Patterson*, 67 N. J. L. 455.

⁵ *Sanderson v. Herman*, 108 Wis. 662.

⁶ See *Spencer v. Marchant*, 125 U. S. 345, 353.

⁷ *Guest v. Brooklyn*, 69 N. Y. 506.

⁸ *State v. Lewis Co.*, 82 Minn. 390.

⁹ *Norwood v. Baker*, 172 U. S. 269; *French v. Barber Asphalt Co.*, 181 U. S. 324.

¹⁰ See *Alleghany v. W. Pa. R. R. Co.*, 138 Pa. St. 375; *Sears v. Street Comm'rs*, 173 Mass. 350. But cf. *Atlanta v. Hamlin*, 96 Ga. 381.

THE SCOPE OF INTERPLEADER. — The bill of interpleader is given to one in the position of an innocent stakeholder who is ready to do his duty in order to free him from subjection to two suits and the possibility of a double liability. The bill, being thus founded on obvious principles of equity and fairness, should be treated by the courts in a liberal spirit, and as far as possible be free from technical requirements. This has been the tendency in England, but our own courts and legislatures seem loath to extend the scope of the remedy.

The requisites of the suit are, roughly speaking, ten in number. 1. The adverse claims must be mutually exclusive.¹ It would be manifestly unjust to make the claimants fight each other when the validity of one claim is not dependent upon the invalidity of the other; there can then be no dispute between the claimants. For this reason, if one of the claimants gets a verdict or judgment the bill no longer lies.² 2. The complainant in the interpleader suit must be willing to bring into court or surrender all that is claimed by either defendant.³ If he has a counterclaim against either claimant he cannot have it determined in such a proceeding. 3. The position of the stakeholder must be such a precarious one that he really needs the help of equity to prevent injustice. Thus, one who is in possession of land claiming no title need only move out. So also the bill does not lie if all the claims would be settled in one suit at law,⁴ or if one of the claims is clearly invalid,⁵ or both are illegal.⁶ 4. There must be no collusion between the complainant and either claimant.⁷ The bill lies to help only a disinterested stakeholder. 5. The stakeholder must not have been placed in his precarious position through his own fault;⁸ and he must not be guilty of laches in pursuing his remedy. 6. If equity is unable to enjoin the prosecution of one of the claims at law, it can give no relief. This was brought out in a recent case where a state court declined to entertain a bill because it could not enjoin a federal court from enforcing its judgment. *Smith v. Reed*, 70 Atl. 961 (N. J., Ch.).

These six requisites are based on sound principles of justice. The following, although supported by authority, are extremely technical and will be found upon examination to have a doubtful equitable basis. 7. It is often required that all the claims be derived from a common source.⁹ This is a survival of the narrow view of interpleader held by the common law. The requisite of privity is foreign to the purpose of the bill; for the position of a stakeholder is equally precarious irrespective of the sources from which the defendants derive their claims. The refusal to allow an interpleader therefore seems unsound.¹⁰ 8. It is sometimes required that the stakeholder have no claim or interest in the stake.¹¹ If the

¹ *Nat'l Life Ins. Co. v. Pingrey*, 141 Mass. 411; *Bassett v. Leslie*, 123 N. Y. 396.

² See *Maxwell v. Leichtman*, 65 Atl. 1007 (N. J. Eq.).

³ *M. & H. R. R. v. Clute*, 4 Paige (N. Y.) 384.

⁴ *Fitts v. Shaw*, 22 R. I. 17.

⁵ *M. & H. R. R. v. Clute*, *supra*.

⁶ *Applegarth v. Colley*, 2 Dowl. N. S. 223.

⁷ *Murietta v. South Amer. Co.*, 62 L. J. Q. B. N. S. 396.

⁸ *Horner v. Willcocks*, 1 Ir. Jur. o. s. 136.

⁹ *First Nat'l Bank v. Bininger*, 26 N. J. Eq. 345. This arises most often where a bailee is seeking to interplead his bailor and one claiming by a paramount title. The requisite of privity in this case had some basis at common law where a bailee could not dispute his bailor's title; but it is now settled that he may if he claims under the authority of a third party. See *Thorne v. Tilbury*, 3 H. & N. 534; 17 HARV. L. REV. 489.

¹⁰ See *Crane v. McDonald*, 118 N. Y. 648; 17 HARV. L. REV. 489.

¹¹ See 4 Pomeroy, *Eq. Jurisp.*, 3 ed., § 1325; *MacLennan, Interpleader*, 64.

amount of the stakeholder's charge is disputed, the bill will not lie;¹² but it is otherwise if the claim is available against and admitted by both defendants.¹³ The result should be the same where the lien is available against only one of the defendants, if he does not dispute it. Hence this requirement is really covered by the second above. 9. The stakeholder must have incurred no collateral or independent liability to either claimant;¹⁴ since, it is argued, one of the claimants may be subjected to two suits to enforce his rights. On the contrary — and this seems to be the better and more modern view — the bill will settle once and for all the ownership of the *res*; and it may settle the whole controversy.¹⁵ The fact of the collateral liability is immaterial and relief should therefore be granted. 10. Lastly, it is insisted that the same thing, debt, or duty, must be claimed by all the defendants.¹⁶ This however seems unnecessarily refined in its technicality. So long as the claims are mutually exclusive, and the stakeholder is willing to bring into court the full amount claimed by either, it would seem that he should be entitled to maintain his bill. And indeed in a few cases it has so been held.¹⁷

CONVERSION OF A MORTGAGE INTO AN ABSOLUTE CONVEYANCE. — Where a deed absolute in its terms is given as security for a debt and simultaneously there is executed an agreement of defeasance the two instruments will be construed together as a mortgage;¹ and if they do not refer to each other parol evidence may be introduced to connect them.² Indeed, if the deed be given as security it will be treated as a mortgage though there be no written defeasance contract.³ Although the admission of parol evidence to establish a mortgage would seem to contradict the deed in violation of the parol evidence rule, it may be justified as preventing fraud and unjust enrichment.⁴ However, the presumption from an absolute deed is that it operates according to its terms, and it has even been held that an oral defeasance agreement must be established beyond reasonable doubt.⁵

At common law a mortgage, whatever its form, vests the legal title to the land in the mortgagee subject to an equity in favor of the mortgagor.⁶ Where the defeasance agreement is separate from the deed, this equity of redemption may be extinguished and the conveyance made absolute without a formal release or a new deed. If the defeasance is not in writing a parol agreement whereby the mortgagee is to be regarded as the unconditional owner will be effective.⁷ While if the defeasance is in a written instrument an agreement that the mortgagee shall take an absolute fee,⁸ or a

¹² *Lawson v. Warehouse Co.*, 70 Hun (N. Y.) 281.

¹³ *Gibson v. Goldthwaite*, 7 Ala. 281.

¹⁴ *Bartlett v. His Imperial Majesty*, 23 Fed. 257; *Crawshaw v. Thornton*, 2 My. & C. 1. *Contra*, *Attenborough v. London, etc., Co.*, 3 C. P. D. 450 (statutory).

¹⁵ See *In re Mersey Docks*, [1899] 1 Q. B. 546.

¹⁶ *Slaney v. Sidney*, 14 M. & W. 800. See 4 Pomeroy, Eq. Jurisp., 3 ed., § 1323.

¹⁷ *Thomson v. Ebbets*, Hopk. Ch. (N. Y.) 272.

¹ *Mooney v. Byrne*, 163 N. Y. 86.

² *Gay v. Hamilton*, 33 Cal. 686.

³ *Preschbaker v. Heirs of Feaman*, 32 Ill. 475.

⁴ See *Bank v. Sprigg*, 1 McLean (U. S.) 178, 184.

⁵ *Ensign v. Ensign*, 120 N. Y. 655.

⁶ *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 382.

⁷ *Shaw v. Walbridge*, 33 Oh. St. 1; *Cramer v. Wilson*, 202 Ill. 83.

⁸ *Scanlan v. Scanlan*, 134 Ill. 630.

surrender of the instrument with intent that it be cancelled,⁹ will convert the mortgage into an absolute conveyance. *A fortiori*, an abandonment of his right of redemption by the mortgagor and an acceptance of a lease of the premises from the mortgagee has the same effect.¹⁰ However, the relation between the mortgagor and the mortgagee is so far fiduciary that courts will carefully scrutinize such transactions¹¹ and the right of redemption will be regarded as extinguished only by an agreement founded on adequate consideration and free from suspicion of fraud.¹² The conversion of a mortgage into an absolute conveyance in this manner is not by way of transfer; for the mortgagee already has the legal fee. Nor is it strictly speaking a release. Some courts work it out on the theory of estoppel, through the surrender of the legal evidence of the mortgagor's claim,¹³ but it seems sufficient to say that it would be inequitable to allow the mortgagor to redeem.¹⁴ Nor does the rule contravene the Statute of Frauds.¹⁵

Through an unfortunate confusion of legal and equitable principles a small majority of American jurisdictions have abrogated the common law doctrine and hold that a mortgage does not pass the legal title to the mortgagee.¹⁶ Of these so-called "lien states," Georgia, Iowa, Michigan, and Nebraska hold that where the defeasance agreement is not contained in the deed title does pass. In these states such mortgages should be convertible into absolute conveyances as in common law jurisdictions.¹⁷ In New York, however, it was recently held that the physical destruction of the instrument of defeasance under a valid agreement that the mortgagee should have the absolute estate did not destroy the right of redemption. *Conover v. Palmer*, 60 N. Y. Misc. 241. Such a holding, though seemingly undesirable, is but the logical result of an illogical doctrine. If the title did not pass by the original deed it is difficult to see how it can do so later by parol agreement or by the destruction of a collateral instrument. The legal estate, being in the mortgagor can only be divested by foreclosure or by a conveyance executed according to statutory requirements.¹⁸ However, some of the "lien states" have refused to be consistent,¹⁹ and it is conceivable that in some circumstances the mortgagor should be estopped to deny the mortgagee's title.²⁰

NECESSITY AS AN EXCUSE FOR A TRESPASS UPON LAND. — Since the earliest times there have been many well-recognized exceptions to the rule that any unauthorized entry upon the land of another is an actionable trespass. Hence the subjection to excusable entries must be regarded as one of the reasonable burdens of property ownership. The legal justifica-

⁹ *Trull v. Skinner*, 17 Pick. (Mass.) 213.

¹⁰ *Seymour v. Mackay*, 126 Ill. 341; *Jordan v. Katz*, 89 Va. 628.

¹¹ See 21 HARV. L. REV. 459, 464. Cf. *Villa v. Rodriguez*, 12 Wall. (U. S.) 323.

¹² *Cassem v. Heustis*, 201 Ill. 208.

¹³ See *Trull v. Skinner*, *supra*, 215. Cf. *Commonwealth v. Dudley*, 10 Mass. 402.

¹⁴ *West v. Reed*, 55 Ill. 242.

¹⁵ *McMillan v. Jewett*, 85 Ala. 476. *Contra*, *Van Keuren v. McLaughlin*, 19 N. J. Eq. 187.

¹⁶ *Barry v. Hamburg-Bremen Ins. Co.*, 110 N. Y. 1.

¹⁷ *Baxter v. Pritchard*, 122 Iowa 590; *Stall v. Jones*, 47 Neb. 706. But see *Thompson v. Mack*, Harr. (Mich.) 150.

¹⁸ *Odell v. Montross*, 68 N. Y. 499; *Keller v. Kirby*, 34 Tex. Civ. App. 404; *Brinkman v. Jones*, 44 Wisc. 498.

¹⁹ *Shubart v. Stanley*, 52 Ind. 46, 51; *Wilson v. Carpenter*, 62 Ind. 495.

²⁰ See *Odell v. Montross*, *supra*. But see *Howe v. Carpenter*, 49 Wisc. 697.

tions for trespasses on land may be roughly divided into three groups: First, where the entry is excused on the ground of implied leave and license.¹ The second division comprises trespasses committed in the administration of justice.² The numerous other circumstances under which trespasses have been excused may be grouped under the head of necessity, public and private.

Justification on the ground of public necessity is based on the broad common law maxim that, in case of conflict, private rights must yield to public convenience and necessity. Thus, an entry on land for the defense of the realm has long since been held justifiable,³ and in this country numerous decisions have exonerated interference with property in time of war.⁴ Also, where the public safety is endangered a trespass is an excusable means of relief,⁵ as, for instance, the destruction of property to prevent the spread of fire.⁶ Another common illustration of this doctrine is the right of a traveller to pass through lands adjoining an impassable highway.⁷

Justification by private necessity is equally well founded in the common law, although here there is no basis of public convenience. The conflict is between the claims of two individuals, so that in each case the court must balance the interest of the land-owner against the needs of the trespasser. The doctrine would therefore seem to be merely an instance of the adoption by the common law of natural rights by necessity. In this the courts are naturally conservative and for its application require some such necessity as the preservation of life or property.⁸ Thus neither the pursuit of game, even though of a dangerous nature,⁹ nor the demand of charity or family affection¹⁰ is a sufficient ground to excuse a trespass. On the other hand, it has always been the rule that an entry to save the goods of the landowner, and, in some circumstances, of a third person, from destruction by fire or water is not actionable,¹¹ and a man may go on land to recover cattle escaped from the highway.¹² The preservation of human life would surely seem to be sufficient necessity, and in the analogous case of trespass to personalty

¹ *Ditcham v. Bond*, 3 Camp. 524; *Martin v. Houghton*, 45 Barb. (N. Y.) 258.

² Entry by officer to make an arrest or attachment. *State v. Smith*, 1 N. H. 346; *Haggerty v. Wilber*, 16 John. (N. Y.) 287. Closely allied are cases of entry by a private individual in the recaption of realty, *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; see *Low v. Elwell*, 121 Mass. 309; or in the recaption of personalty, *Patrick v. Colerick*, 3 M. & W. 483; *Madden v. Brown*, 8 N. Y. App. Div. 454 (the theory of implied license suggested in these cases seems a fiction); or to abate a nuisance, *Amoskeag Co. v. Goodale*, 46 N. H. 53. See *Brown v. Perkins*, 12 Gray (Mass.) 89.

³ 20 Vin. Abr., Trespass (B. a), pl. 4; *Saltpetre Case*, 12 Rep. 12.

⁴ *Respublica v. Sparhawk*, 1 Dall. (U. S.) 357; *United States v. Pacific R. R.*, 120 U. S. 227.

⁵ *Dewey v. White*, M. & M. 56. See *Seavey v. Preble*, 64 Me. 120.

⁶ *Suocco v. Geary*, 3 Cal. 69; *Russell v. Mayor of N. Y.*, 2 Den. (N. Y.) 461. See *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277.

⁷ *Campbell v. Race*, 7 Cush. (Mass.) 408; *Morey v. Fitzgerald*, 56 Vt. 487; *Absor French*, 2 Show. 29, where the adjoining landowner caused the obstruction. In the case of a private way deviation is excusable only when the owner of the servient tenement causes the obstruction. *Haley v. Colcord*, 59 N. H. 7; *Taylor v. Whitehead*, 2 Doug. 745.

⁸ The necessity must arise independently of the fault of the trespasser. 6 Bacon, Abr., Trespass, 674; Anonymous, Y. B. 6 Ed. IV. 7, pl. 18. See *Millen v. Fawdry*, Latch. 119.

⁹ *Glenn v. Kays*, 1 Ill. App. 479; *Paul v. Summerhayes*, 4 Q. B. D. 9.

¹⁰ *Parlet v. Bowman*, 2 Rol. Abr. 567; *Neilson v. Brown*, 13 R. I. 651.

¹¹ 20 Vin. Abr., Trespass (H. a. 4), pl. 24; *ibid.* (K. a) pl. 3; *Proctor v. Adams*, 113 Mass. 376.

¹² *Goodwin v. Cheveley*, 4 H. & N. 631; *Rightmire v. Shepard*, 12 N. Y. Supp. 800.

it has been so held.¹³ The admiralty doctrine of jettison seems based on this ground.¹⁴ And the old books say that a man fleeing from attack may cross another's close with impunity.¹⁵ A recent decision raises this question, it is believed, for the first time in this country. While sailing with his family the plaintiff was forced by a storm to moor to the defendant's dock to save his boat and the people in it from destruction. The defendant cast off the boat, with the result that it was wrecked and the plaintiff injured. The court, in overruling the defendant's demurrer, held that the plaintiff's trespass was excused by its necessity. *Ploof v. Putnam*, 71 Atl. 188 (Vt.). Stress of weather has been held sufficient necessity to justify a breach of the Embargo Act.¹⁶ The decision therefore seems correct and in accord with authority. Whether, though the entry is excusable, an action at the suit of the landowner will lie for any damage done is a point upon which there is as yet no authority.¹⁷

MERGER OF ESTATES HELD IN DIFFERENT RIGHTS.—Merger is the process by which one estate is destroyed through union with another estate in the same land. For one estate to be thus "drowned" by another these conditions at least are admittedly essential: the two estates must come into the same ownership; the second must be the next vested estate in succession; and the second must in legal contemplation be at least as large as the first.¹ On the question whether to these requisites there must be added, as a fourth, that the two estates be held in the same right, there has been an extraordinary variety of opinion.²

In an early case it seems to have been suggested that the mere fact of the estates being in different rights could never prevent merger;³ but this has never been followed,⁴ and later discussion has been concerned with the conditions under which such estates could merge, if at all. Another early decision declared that a term in *autre droit* would merge in a reversion in proper right acquired by feoffment, but not in an estate passed by bargain and sale.⁵ This distinction, however, has been overlooked in later cases and, it is submitted, not unfortunately. The foundation of merger is metaphysical—the medieval lawyer felt a logical incongruity in one man being lord and tenant of the same estate, or in an estate continuing its independent existence, when in the same hands as one in immediate succession that in the eye of the law includes it.⁶ It is clear that neither incongruity can be increased or diminished by the formal or informal character of the process by which unity of possession is achieved. Still another solution was reached by Lord Coke, who declared that if the subsequent estate be

¹³ *Mouse's Case*, 12 Rep. 63. See *Republica v. Sparhawk*, *supra*.

¹⁴ See *Abbott, Shipping*, 14 ed., 753-757; *Price v. Hartshorn*, 44 N. Y. 94.

¹⁵ 6 Bacon Abr., Trespass, 674. But cf. *Gilbert v. Stone*, Ayleyn 35.

¹⁶ *The Brig William Gray*, 1 Paine 16.

¹⁷ See 3 HARV. L. REV. 189, 204; Terry, *Principles of Anglo-American Law*, § 425.

¹ Challis, *Real Property*, 2 ed., 76.

² The cases on the merger of estates held in different rights have generally involved either the coalescence in the same hand of an executor's term and a reversion in the owner's personal right, or of an estate in the right of a wife and an estate in the husband's own right.

³ See *Lee's Case*, 3 Leon. 110.

⁴ *Bracebridge v. Cook*, Plowd. 417.

⁵ *Downing v. Seymour*, Cro. Eliz. 911.

⁶ See 3 Preston, *Conveyancing*, 3 ed., 15 *et seq.*

in the proper right of the holder there will be no merger; but that a prior estate in the holder's own right must merge in a reversion in *autre droit*.⁷ Although it seems as improper to draw a distinction from the sequence of estates as from the process of conveyance, Coke's theory has received some notice from the courts.⁸ But there is a clear decision against it.⁹

Numerous early decisions¹⁰ and probably the majority of modern writers¹¹ lay down the rule that if the estates come into the same hand by act of the parties, merger ensues; if the accession is by act of law, the two estates continue their independent existences. The general American doctrine¹² and the principle of some English *obiter* declarations¹³ is that merger is impossible in the case of estates held in different rights. A recent holding that a husband's purchase of the reversion expectant on his wife's term will not work a merger, even at common law, is in accord with these cases. *Hurley v. Hurley*, 42 Ir. L. T. 253 (Ire., Ct. App., Nov. 16, 1908). The conclusion reached seems on principle correct, the argument of the text-writers for merger in the case of estates united by act of the parties being in several respects open to objection. To say that the parties intend a merger is to argue in a circle; they intend merely the reasonably apparent consequences of their act. Where there is a well-settled conflict as to whether merger ensues, there is no reason for supposing that in fact it is intended. Indeed, the mere bringing of suit by the holder of the merged estate shows that it is only the acquiring party who intends the destruction of the prior estate. Nor can it be admitted that the foundation of merger is intention; certainly the theory on which a term for hundreds of years is drowned in a shorter reversionary term is not that the holder¹⁴ intends the result. On general grounds of legal policy it seems desirable that the technical and metaphysical principle of merger be, as far as possible, limited in the modern law.

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE BY ADVERSE POSSESSION — TENANT HOLDING FOR DEFINITE TERM. — A leased land to B for a term of twelve years. Shortly afterwards A made an invalid gift of the land to C, and B, at A's direction, attorned and paid rent to C. C's actual possession was for less than the statutory period, but, coupled with that of B, it made up the time required by the statute. *Held*, that the possession of B cannot be adverse to A, and therefore the statute does not run in C's favor during the existence of the term. *Acharath Bappan v. Mathummal Chovi*, 4 Madras L. T. 327.

It is generally held in this country that if a tenant at will, or from year to year, disclaims the title of his landlord, claiming the fee adversely in himself or for a third person, and this disclaimer is brought to the notice of the landlord, the tenancy is forfeited and the statutory period begins to run. *Willison v.*

⁷ Co. Lit. 338 b.

⁸ See *Nurse v. Yerworth*, 3 Swanst. 608, 618.

⁹ *Lichden v. Winsmore*, 1 Rolle Abr. 934.

¹⁰ 4 Leon. 37 (CII); *Carter v. Lowe*, Owen 56.

¹¹ See especially, 3 Preston, Conveyancing, 3 ed., 273 *et seq.*

¹² See *Little v. Bowen*, 76 Va. 724.

¹³ See *Yong v. Radford*, Hob. 3.

¹⁴ *Hughes v. Robotham*, Cro. Eliz. 302.

Watkins, 3 Pet. (U. S.) 43. The language of the courts is broad enough to cover the case of a tenant in for a definite term, and the same is true of a leading English case. *Hovenden v. Lord Annersley*, 2 Sch. & Lef. 607. But in England it was later held that the rule does not apply to a tenant for a term. *Doe d. Graves v. Wells*, 10 A. & E. 427. Even in this country the early dicta have lost force in some states. *Whiting v. Edmunds*, 94 N. Y. 309. The Indian rule is that the tenancy becomes forfeited only if the landlord elects to treat it so. See *Ittappan v. Manavikrama*, I. L. R. 21 Madras 153. A peculiar feature of the principal case is that, granted there is a forfeiture, the landlord, having directed the very acts which worked the forfeiture, would probably be estopped to assert his right of entry.

BANKRUPTCY — PREFERENCE — UNRECORDED TRANSFER OF SECURITY FOR PRESENT ADVANCES. — More than four months before the bankruptcy of X, A advanced money to X, taking a mortgage on realty which was not recorded until within four months of the bankruptcy. *Held*, that the mortgage is not a preference and hence the delay in recording is immaterial. *Claridge v. Evans*, 118 N. W. 198 (Wis.).

Section 60 a of the Bankruptcy Act of 1898 as amended in 1903 provides that "When the preference consists of a transfer, the period of four months shall not expire until four months after recording." Before this amendment, in determining whether transfers for antecedent debts were made within four months of the bankruptcy, the courts looked only at the date of making, not of recording. *In re Wright*, 96 Fed. 187. The amendment was passed to correct this situation. See *English v. Ross*, 140 Fed. 630, 635. But the requirement of recording does not make the mortgage in the present case a transfer for an antecedent debt; for it is a valid transfer between the parties without recording. *Mathwig v. Mann*, 96 Wis. 213. It was, then, a transfer for a present advance, and such a transfer, no matter when made, creates no preference as defined by the statute. *In re Noel*, 137 Fed. 694. Hence the four-months rule has no bearing on the case. Therefore the amendment, which regulated only the mode of determining the four-months period, does not apply, and the decision seems clearly right.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHT OF ACTION FOR MALICIOUS ATTACHMENT. — A bankrupt corporation brought an action for malicious attachment of property. The defendant asked for a judgment on the pleadings on the ground that whatever right of action the plaintiff might have had was vested in its trustee in bankruptcy. *Held*, that the plaintiff cannot maintain the action. *Hansen Mercantile Co. v. Wyman, Partridge & Co. et al.*, 41 Chic. L. N. 120 (Minn., Sup. Ct., Oct. 2, 1908).

Under § 70 a of the Bankruptcy Act of 1898 the trustee in bankruptcy is vested with all rights of action arising from injury to the property of the bankrupt. An action for malicious prosecution and arrest is a personal action and does not pass to the trustee. *In re Huensell*, 91 Fed. 355. And an action for malicious abuse of an attachment process is held to be an action for a personal tort, although there is an injury resulting to the bankrupt's business. *Noonan v. Orton*, 34 Wis. 259. But the principal case is distinguishable in that the plaintiff is a corporation and as such, of course, cannot sue for a purely personal tort. The tort of malicious attachment has two elements. It is not only a personal injury, but also an injury to property in that it hurts the defendant's business and credit. *Lawrence v. Hagerman*, 56 Ill. 68. It is submitted that when the plaintiff in such a suit is a corporation, the gist of the action is the injury to its property. *Cf. Trenton Ins. Co. v. Perrine*, 23 N. J. L. 402. It follows that its right of action vests in the trustee.

BILLS AND NOTES — ANOMALOUS INDORSER — PAROL EVIDENCE TO SHOW INTENT OF PARTIES. — §§ 113 and 114 of the Negotiable Instruments Law provide that "Where a person not otherwise a party to an instrument

places his signature thereon before delivery he is an indorser and . . . if the bill is payable to the order of the maker he is liable to all parties subsequent to the maker." A drew a bill on B to his own order. B accepted it and C indorsed it before delivery to A. A sued C and offered parol evidence that C signed with the intention to lend his credit to B in accordance with an agreement with A. *Held*, that the evidence is admissible. *Haddock, Blanchard & Co. v. Haddock*, 85 N. E. 682 (N. Y.).

Before the adoption of the Negotiable Instruments Law in New York a stranger who indorsed a bill in blank before delivery was presumably only a second indorser, but this presumption could be overcome by parol evidence that he intended to become liable to the payee. *Moore v. Cross*, 19 N. Y. 227. The theory was that the parol evidence did not change his character of indorser, but simply showed an authority in the maker to indorse without recourse to the anomalous indorser who was then taken to have indorsed back to the maker. This doctrine reconciles the present decision with § 113 of the Negotiable Instruments Law, for the parol evidence does not affect the defendant's liability as indorser. § 114 provides for liability to parties subsequent to the maker, but does not negative liability to the maker. Hence the court concludes that there is nothing in the statute inconsistent with the old rule which allowed parol evidence to show the true agreement between the payee and the anomalous indorser.

CARRIERS—DUTY TO ACCEPT AND CARRY PASSENGERS—PRIVATE CARRIERS.—The defendant company ran a steamer exclusively for the purpose of carrying visitors to and from its amusement park on an island. Its tickets included the ride on the steamer and admission to the park. The plaintiff was refused admission to the steamer because of former disorderly conduct. *Held*, that the defendant is not a common carrier to and from its island, and has a right to exclude the plaintiff. *Meisner v. Detroit Ferry Co.*, 118 N. W. 14 (Mich.).

A common carrier is one who undertakes by virtue of his calling to carry indifferently for all who may choose to employ him. *Iron Works v. Hurlbut*, 158 N. Y. 34. A private carrier is one who does not carry for all indifferently, but only under special circumstances. *Allen v. Sackrider*, 37 N. Y. 341. The duties of a common carrier are imposed on him because of the public nature of his employment. *McNeill v. Durham Ry. Co.*, 135 N. C. 682. The interest of the public must be concerned in his enterprise, and to find this the character of the business must be considered. *Sholl v. Coal Co.*, 118 Ill. 427. A railroad run exclusively for private purposes is not a common carrier, since the public has no equal right to use it. *Wade v. Cypress Lumber Co.*, 74 Fed. 517. A private ferry running to and from the premises of an individual, who could refuse to admit anyone, has been held not to be in a public employment. *People v. Mago*, 69 Hun (N. Y.) 559. The public can hardly be said to be concerned in the service of the defendant to its island in the case considered. For example, the boats could undoubtedly cease running without violating any right of the public.

CHATTEL MORTGAGES—RECORDING AND REGISTRY—PRIORITY BETWEEN MORTGAGEES.—A took a chattel mortgage on goods subsequently to be acquired by B. The mortgage was not recorded for a month. After the execution but before the recording of this mortgage C sold goods to B and took a mortgage thereon for the purchase price. C's mortgage was recorded after A's and after the goods had been delivered to A upon condition broken. C brought replevin to recover the goods. *Held*, that he cannot recover. *Garri-son v. Street & Harper Furniture, etc., Co.*, 97 Pac. 978 (Okl.).

Where the recording statute provides a definite period within which a chattel mortgage must be recorded, a mortgage so recorded will be valid from its execution even as against a lien attaching before the recording. *McCarthy v. Seisler*, 130 Ind. 63. Where the statute provides no period within which the mortgage is to be recorded, it must be done within a reasonable time. *Wilson*

v. Milligan, 75 Mo. 41. And if it is so recorded it should have the same retroactive effect. But in the principal case A's mortgage was not recorded within a reasonable time. *Wilson v. Milligan*, *supra*. In such circumstances it has been held that an intervening creditor who takes a mortgage without notice will be protected although the prior mortgage is recorded first. *Bank of Farmington v. Ellis*, 30 Minn. 270. Cf. *Crooks v. Stuart*, 2 McCrary 13. It is submitted that this view is more equitable and more in accord with the purpose of the statute than the holding in the principal case, and it would seem that the delivery of possession to A should not affect the decision; for there is no authority for giving delivery an effect different from that of recording.

CONFLICT OF LAWS — MARRIAGE — VALIDITY OF FOREIGN MARRIAGE. — A Wisconsin statute prohibited remarriage by a divorcee within a year after the decree rendered, and declared that a marriage so contracted would be held null and void. To evade this statute the plaintiff and decedent were married in Michigan within a year after the latter had obtained a divorce. *Held*, that the marriage is void. *Lanham v. Lanham*, 117 N. W. 787 (Wis.).

That the validity of a marriage is determined by the *lex loci contractus* is the general rule in this country. *State v. Richardson*, 72 Vt. 49. But it is within the power of a state to declare by statute that certain marriages will not be recognized. *Pennegar v. State*, 87 Tenn. 244. And when a marriage valid where celebrated comes within the terms of such a statute, the question to be determined is one of legislative intent. *State v. Kennedy*, 76 N. C. 251. In this determination the courts refuse to construe a statute literally unless it reflects a state public policy. See *Van Voorhis v. Brintnall*, 86 N. Y. 18. And by the weight of authority no such policy is involved in statutes dealing with the remarriage of divorced persons. *Commonwealth v. Lane*, 113 Mass. 458. Cf. *McLennan v. McLennan*, 31 Ore. 480. Thus, the statute is held to apply only to marriages celebrated within the state. *Willey v. Willey*, 22 Wash. 115. In many states, however, such judicial legislation is not upheld, and the evasion of the law sought to be effected by temporary resort to a foreign jurisdiction, is not allowed. *Kruger v. Kruger*, 36 Nat. Corp. Rep. 442 (Ill., May, 1908); *Stull's Estate*, 183 Pa. 625. On principle these decisions are sound, but their effect upon the rights of innocent parties is deplorable. See *Commonwealth v. Lane*, *supra*.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN PENAL LAWS — ASSESSMENTS. — An action was brought in England by an Australian municipality to recover a sum levied by it for street improvements. An Australian statute gave a right of action for such assessments. *Held*, that the action does not lie. *Sydney Municipal Council v. Cook*, 25 T. L. R. 6 (Eng., K. B. D., Oct. 15, 1908). See NOTES, p. 292.

CONTRACTS — DIVISIBLE CONTRACTS — PART PERFORMANCE OF INDIVISIBLE CONTRACT. — The plaintiff under an entire contract had furnished labor and material in installing a heating plant in the defendant's building, which was destroyed before the work was completed. The units of the plant had become part of the defendant's land when put in place. *Held*, that the defendant must pay in terms of the contract, irrespective of the benefit he has derived. *Dame v. Wood*, 70 Atl. 1081 (N. H.).

The general rule is that, when a party has contracted to do an entire work for a specific sum, he cannot recover unless the work be done. *Appleby v. Myers*, L. R. 2 C. P. 651. Relief is usually given quasi-contractually, however, to prevent the unjust enrichment of the defendant. *Britton v. Turner*, 6 N. H. 481. But a recovery for part performance such as was allowed in the present case is directly opposed to all the English decisions on the subject. See *Appleby v. Myers*, *supra*. It is analogous to the American rule that gives a servant employed on an entire contract, who is discharged for cause, a right to recover in terms of the contract. *Hildebrand v. Am. Fine Art Co.*, 109 Wis. 171. But that extension of the general rule is unsound in principle. See *Tim*

berlake v. Thayer, 71 Miss. 279. The rule of the principal case is frequently followed on the ground that there is an implied promise to pay at the contract price for part performance, if further performance becomes impossible. *Butterfield v. Byron*, 153 Mass. 517. Such a construction seems nothing more than an unjustifiable fiction, and is opposed to the weight of American authority. *Siegel Cooper Co. v. Eaton & Prince Co.*, 165 Ill. 550.

CORPORATIONS — FEDERAL JURISDICTION — FORMATION OF NEW CORPORATION TO EFFECT DIVERSITY OF CITIZENSHIP. — The stockholders of a corporation organized in another state a new corporation, with the same officers and stockholders, in order to get a suit concerning certain land into the federal courts. The land was transferred by the first corporation to the second, which then brought an action in the federal court against a citizen of the state in which the original corporation was incorporated. *Held*, that the action is dismissed as an attempted fraud on the federal jurisdiction. *Miller & Lux v. East Side Canal, etc., Co.*, U. S. Sup. Ct., Dec. 7, 1908. See NOTES, p. 290.

CORPORATIONS — STOCKHOLDERS: POWERS OF MAJORITY — SUIT BY STOCKHOLDERS ON CORPORATION'S CAUSE OF ACTION. — M was a director and majority shareholder in the plaintiff corporation. The other three directors, who owned the remaining shares, became interested in a rival company, and refused to sanction proceedings against it for infringement of the plaintiff's patent. Thereupon M brought action in the plaintiff's name to restrain the rival company. His fellow-directors applied to have the name of the plaintiff struck out, as having been used without authority. *Held*, that the application must be dismissed, as the majority shareholders had the right to control the action of the directors in the matter. *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd.*, 25 T. L. R. 69 (Eng., Ch. D., Nov. 13, 1908).

In this country an action in the corporate name usually can be brought only by the directors. *Arkansas River, etc., Co. v. Farmers Loan & Trust Co.*, 13 Colo. 587. But disloyalty on the part of directors in their fiduciary relations to the stockholders will justify the latter in equitable proceedings to compel proper action. *Singers-Bigger v. McCourt*, 145 Fed. 103. And where directors decline to sue, any stockholder can secure an injunction to prevent a third party, aided by the directors, from wronging the plaintiff's corporation. *Weidenfeld v. Sugar Run Co.*, 48 Fed. 615. The corporation and the wrongdoer, however, must be joined as parties defendant. *Donnelly v. Sampson*, 115 N. W. 1089. In England the majority shareholders can decide whether an action in the corporate name shall proceed. *Pender v. Lushington*, 6 Ch. Div. 70, 79. And any shareholder may file a bill against the directors, joining the corporation as co-plaintiff. *MacDougall v. Gardiner*, 1 Ch. Div. 13. If a dispute arises as to which side represents the majority shareholders, the court will grant a temporary injunction until it is determined. *Pender v. Lushington, supra*. In neither country is there authority for action, as sanctioned by the main case, brought by shareholders against a wrongdoer, without proceeding through the directors, either as plaintiffs or defendants.

CORPORATIONS — TRANSFER OF STOCK — SECRET AGREEMENT BY CORPORATION TO REDEEM STOCK. — In consideration of his subscription to the capital stock of a corporation, the subscriber was promised that at any time within ten years the corporation would buy back his stock at par value, on ninety days' notice. *Held*, that the agreement is void. *Matter of Owen Publishing Co.*, 20 Am. B. R. 639 (Circ. Ct., W. D. N. Y., May, 1908).

A corporation cannot, unless the power be especially delegated, change the amount of its capital stock. *Scovill v. Thayer*, 105 U. S. 143. The purchase of its own shares amounts to a reduction, and an agreement to purchase is bad for that reason. *Currier v. The Slate Co.*, 56 N. H. 262. Furthermore, such an agreement is a fraud on creditors, for if it were carried out it would diminish their security, at least until a resale. *Copin v. Greenless and Ransom Co.*, 38 Oh. St. 275. In the principal case even a resale would not protect creditors;

for, the purchase coming after insolvency, the company would be buying in at par shares which had fallen in value. And the courts go great lengths to prevent individual shareholders from escaping their proportionate liability. For instance, where a creditor of a corporation took its shares at twenty per cent. of their par value in payment of a debt, it was held that he was liable for the unpaid balance. *Jackson v. Turner*, 64 Ia. 469. As the secret agreement in the principal case would release the subscriber from liability, the court seems clearly right in holding it void.

EQUITY — JURISDICTION — LIABILITY OF PURCHASER AT FORECLOSURE SALE. — In an action to foreclose a junior mortgage, the property was sold subject to a prior mortgage. The purchaser failed to complete payment at the proper time, and the property was thereafter sold under a judgment of foreclosure on the prior mortgage. The junior mortgagee then made a motion that the court direct the purchaser to pay the damages caused by the latter's default. *Held*, that the purchaser must pay. *State Bank v. Wilchinsky*, 112 N. Y. Supp. 1002 (App. Div.).

The jurisdiction of a court of equity to compel a purchaser at a sale made under its decree to complete his purchase or to pay damages, is well settled. *Wood v. Mann*, 3 Sumn. (U. S.) 318. It is frequently given as an all-sufficient reason for such jurisdiction, that since the purchaser has made himself a party to the proceedings, he may be compelled to perform his undertaking. See *Archer v. Archer*, 155 N. Y. 415. The real basis, however, for holding that the purchaser has made himself a party to the proceedings is the contract implied between him and the referee. See *Harding v. Harding*, 4 Myl. & C. 514; *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200. The referee is under obligation to convey title, and the purchaser to pay the agreed price. *Townshend v. Simon*, 38 N. J. L. 239. And the referee may bring an action at law against the purchaser, for the mortgagee's benefit. *Sharman v. Walker*, 68 Ga. 148. But the theory that there is a contract has been repudiated in New York, so that there is no remedy against the purchaser, except as in the principal case by application to the court of equity which entertained the original suit. *Milner v. Collyer*, 36 Barb. (N. Y.) 250. This limitation of the purchaser's liability seems hardly justifiable.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ANCILLARY JURISDICTION. — The plaintiff, in a suit properly brought in a federal court, obtained a decree for the payment of damages. An execution was issued and returned unsatisfied. The plaintiff then filed the present bill in the same court praying that fraudulent conveyances by some of the defendants to the first bill be set aside and the execution satisfied. The plaintiff was a citizen of Massachusetts and some of the alleged fraudulent grantees, who had been made parties to the second bill, were citizens of the same state. These defendants moved to dismiss for want of jurisdiction. *Held*, that the bill is within the jurisdiction of the federal court. *Hobbs v. Gooding*, 164 Fed. 91 (Circ. Ct., D. Mass.).

In order to give jurisdiction on the ground of diverse citizenship, the diversity must exist between the plaintiff and all of the defendants. *Gage v. Riverside Trust Co.*, 156 Fed. 1002. The second bill here raised no federal question and was, therefore, clearly without the jurisdiction of the court in the absence of the original proceedings. There is, however, a well-established doctrine that after a federal court has once properly acquired jurisdiction, ancillary or supplemental proceedings may be therein entertained, without regard to the tests of jurisdiction applied to independent suits. *Root v. Woolworth*, 150 U. S. 401. Nor need the ancillary suit be between the same parties as the original suit. *Freeman v. Howe*, 24 How. (U. S.) 450. See *Krippendorf v. Hyde*, 110 U. S. 276, 280-281. The cases show a tendency to extend this jurisdiction rather than to curtail it. *White v. Ewing*, 159 U. S. 36. And that a court should exercise it to secure to litigants the benefit of its judgment or decree by removing obstacles to its enforcement seems logical. Bills substantially similar to that in the prin-

cial case have been deemed ancillary and such a holding is, it is submitted, correct on principle. *Dewey v. West Fairmont Gas Co.*, 123 U. S. 329; *Hatch v. Dorr*, 4 McLean (U. S.) 112. See *Campbell v. Golden Cycle Mining Co.*, 141 Fed. 610, 613.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ANTICIPATION OF FEDERAL QUESTION. — In a bill for specific performance of a contract made by residents of the same state the plaintiff, after the necessary averments, alleged that the defendant based his refusal to comply with the contract on a certain act of Congress. And he further alleged that such act was either inapplicable or against the Constitution. *Held*, that the federal court is without jurisdiction. *Louisville & Nashville R. R. Co. v. Mottley*, 29 Sup. Ct. 42 (U. S. Sup. Ct., Nov., 1908).

The general presumption is that a federal court is without jurisdiction until the contrary affirmatively appears on the record. *Ex parte Smith*, 94 U. S. 455; *Robertson v. Cease*, 97 U. S. 646. It is usually sufficient that the facts essential to jurisdiction appear in any part of the record. *Denny v. Pironi*, 141 U. S. 121. But when federal jurisdiction is invoked on the ground that the suit is "one arising under the Constitution and laws of the United States," such federal question must be shown by the plaintiff at the outset in his bill or declaration. *California Oil & Gas Co. v. Miller*, 96 Fed. 12. See *Houston & Texas Central R. R. Co. v. Texas*, 177 U. S. 66. Moreover, the allegations on which jurisdiction is based must be material to the plaintiff's real cause of action. *Joy v. City of St. Louis*, 201 U. S. 332. Therefore, if such averments have been inserted merely to make the suit one of federal cognizance, the case will be dismissed. *Robinson v. Anderson*, 121 U. S. 522. And it is well settled that in cases both of original jurisdiction and of removal an allegation in the nature of a reply to an expected defense will not confer jurisdiction. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454; *Joy v. City of St. Louis*, *supra*. This seems correct, as the defendant might not in fact set up such defense. *Florida Central, etc., R. R. Co. v. Bell*, 176 U. S. 321. And even if such answer were made, that in itself would not be sufficient to bring the case within federal jurisdiction. *Colorado, etc., Mining Co. v. Turck*, 150 U. S. 138. See *Metcalf v. Watertown*, 128 U. S. 586.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — SUIT AGAINST "STATE DISPENSARY COMMISSION." — The Legislature of South Carolina created a commission to wind up the affairs of the state liquor business. The complainants, who claimed for liquor sold to the state, sued the commission in the federal court for an accounting, an injunction, and a receivership. *Held*, that the suit is not one against the state within the meaning of the Eleventh Amendment. *Murray v. Wilson Distilling Co.*, 164 Fed. 1 (C. C. A., Fourth Circ.). See NOTES, p. 289.

INJUNCTIONS — ACTS RESTRAINED — INTERFERENCE WITH HUNTING RIGHTS. — The defendant, claiming the exclusive right to hunt ducks on an arm of certain navigable waters, persistently prevented the plaintiff from hunting, by rowing among the decoys and frightening the ducks. *Held*, that the plaintiff will be protected by injunction. *Ainsworth v. Munoskong Hunting and Fishing Club*, 116 N. W. 992 (Mich.).

The owner of realty has such a right in all game on his property that an injunction will be issued to prevent hunting thereon, even though the entire property is subject to use as a waterway. *Sterling v. Jackson*, 69 Mich. 488. And damages will be given against one who intentionally frightens game on another's land. *Ibottson v. Peat*, 3 H. & C. 644. The right to capture and subject to ownership game on public lands, or fish in public navigable waters, resides in the people of the sovereignty. *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290. Where this right is exercised as a vocation, it will be protected as such, against wrongful acts. However, competition in itself for such game is not unlawful. See *Ibottson v. Peat*, *supra*. But an action on the case was allowed for wilfully

disturbing ducks coming toward an ancient decoy. *Carrington v. Taylor*, 11 East 571. And an exercise of the right to fish in navigable waters, that would exclude all others from fishing therein, will be enjoined. *Morris v. Graham*, 16 Wash. 343. Then, although the right to hunt on public lands may be exercised solely as a recreation, it should, nevertheless, be adequately protected against what may be termed unlawful competition.

INNKEEPERS — DUTY TO GUESTS — LIABILITY OF INNKEEPERS FOR INSULT TO GUEST. — The plaintiff was a guest at the defendant's hotel. At night one of the employees of the hotel, by order of the defendant, forcibly entered the plaintiff's room, used insulting language, and threatened to turn her out as a disreputable woman. *Held*, that the defendant is liable. *De Wolf v. Ford*, 40 N. Y. L. J. 811 (N. Y., Ct. App., Nov. 7, 1908).

This decision reverses the decision of the lower court criticized in 21 HARV. L. REV. 58.

INSURANCE — DEFENSES OF INSURER — EXECUTION OF INSURED FOR CRIME. — A insured his life with the defendant company under a policy which contained no provision against death at the hands of justice. The policy was executed at the office of the company in Wisconsin and by its terms was made payable there. A special act of the Wisconsin legislature incorporating the company empowered it "to make all and every insurance appertaining to or connected with any life risks." The insured committed a murder and was convicted and executed therefor. *Held*, that there may be a recovery on the policy. *McCue v. Northwestern Mut. Life Ins. Co.*, 14 Va. L. Reg. 584 (C. C. A., Fourth Circ.).

The federal court here goes squarely against a prior decision in the United States Supreme Court. *Burt v. Ins. Co.*, 187 U. S. 362. But it justifies itself on the ground that the policy is a Wisconsin contract and therefore its validity should be determined by the public policy of that state. It finds that insurances like that in the principal case are not against the public policy of Wisconsin because the statute allows insurance on "any life risks," and because the Supreme Court of Wisconsin has allowed recovery on silent policies where the insured has committed suicide. *Patterson v. Mutual Life Ins. Co.*, 100 Wis. 118. It is interesting to note that the court considers the question of public policy involved in execution cases as identical with that raised by suicide cases. For a discussion of cases similar to the one under consideration, see 21 HARV. L. REV. 530.

INTERPLEADER — SCOPE OF THE REMEDY — INABILITY OF COURT TO ENJOIN. — By proceedings in a state court C attached a judgment recovered by B against A in a federal court. A filed a bill of interpleader in the state court. *Held*, that the bill will not lie, since a state court cannot interfere with the power of a federal court to enforce its judgment. *Smith v. Reed*, 70 Atl. 961 (N. J., Ct. Ch.). See NOTES, p. 294.

JOINT WRONGDOERS — LIBEL — CONTRACT TO INDEMNIFY PRINTERS AGAINST CLAIMS FOR LIBEL. — The plaintiffs agreed to publish the defendant's paper for him upon his promise to indemnify them "against any claims whatever in respect of any libel appearing." The plaintiffs were later sued for a libel which had appeared with their full knowledge, and had to pay damages. They then sued the defendant on the contract of indemnity. *Held*, that they cannot recover. *Smith & Son v. Clinton*, 25 T. L. R. 34 (Eng. K. B. D., Oct. 28, 1908).

The law allows no contribution between intentional and conscious wrongdoers. *Merryweather v. Nixan*, 8 T. R. 186. And contracts to indemnify such wrongdoers are void. *Arnold v. Clifford*, 2 Sumn. (U. S.) 238. The present case, therefore, is supported by the authorities. *Atkins v. Johnson*, 43 Vt. 78. It has never been decided, however, whether an express contract of indemnity would be a nullity where both parties are equally anxious to avoid the publica-

tion of libellous matter. Contribution is generally allowed between negligent but unconscious wrongdoers. *Armstrong Co. v. Clarion Co.*, 66 Pa. 218. See 12 HARV. L. REV. 176. *A fortiori*, contracts to indemnify non-negligent unconscious wrongdoers will be supported. *Stone v. Hooker*, 9 Cow. (N. Y.) 154. And in construing a contract of indemnity no presumption will be indulged that a contract contrary to public policy was intended. *Babcock v. Terry*, 97 Mass. 482. So, such an agreement between an editor and a printer who are *bona fide* may be construed as one to indemnify for all expenses incurred in groundless suits. See *Babcock v. Terry*, *supra*. And it is submitted that the action on the indemnity contract should not cease to be maintainable because, in a doubtful case, the court support the jury in finding that there was an actionable libel.

MALICIOUS PROSECUTION — PROBABLE CAUSE — CONVICTION SUBSEQUENTLY REVERSED AS EVIDENCE. — The defendant instituted criminal proceedings against the plaintiff, who pleaded guilty and was convicted; but the judgment was reversed on appeal. The plaintiff then brought an action for malicious prosecution. *Held*, that the conviction is conclusive evidence of probable cause for instituting the criminal proceedings. *Smith v. Thomas*, 62 S. E. 772 (N. C.).

In an action for malicious prosecution the plaintiff must prove that there was no probable cause for instituting the criminal proceedings. *Gurley v. Tomkins*, 17 Colo. 437. Many courts hold that a judgment of conviction, although subsequently reversed, is *prima facie* evidence of probable cause. *Nicholson v. Sternberg*, 61 N. Y. App. Div. 51. But the weight of authority supports the principal case in holding that a conviction in the original court is conclusive evidence of probable cause. *Parker v. Huntington*, 73 Mass. 36. There is some authority for the rule that such conviction is not evidence of probable cause when for any reason it carries no probative force. *Nehr v. Dobbs*, 47 Neb. 863. But it is generally considered evidence unless secured by fraud or perjury. *Gilmore v. Martin*, 115 Ill. App. 46; *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141. Logically, however, the fact of a conviction subsequently reversed should be evidence in such an action only so far as it tends to establish that the defendant had reasonable grounds for instituting the criminal proceedings and an honest belief in the guilt of the accused at the time such proceedings were commenced. For it is upon these tests that the defendant's case depends, not upon the evidence produced at the trial. *Harkrader v. Moore*, 44 Cal. 144.

MARRIAGE — NULLIFICATION — PERMANENT ALIMONY. — The defendant went through a form of marriage with the plaintiff, which would have been valid if the former had not already been married. Thereafter the plaintiff materially helped him in acquiring property. The trial court annulled the marriage, and granted to the plaintiff an undivided fourth interest in the defendant's realty. *Held*, that it is proper to dispose of the defendant's property in the same way as in a case of divorce. *Buckley v. Buckley*, 96 Pac. 1079 (Wash.).

In awarding alimony, it is proper to consider not only the damages suffered by reason of the marriage, but also the amount of the husband's property, his ability to earn money, and the station in which he ought to maintain the wife if the marriage relation were continued. See *Pauly v. Pauly*, 69 Wis. 419. Alimony is awarded on this comprehensive basis, because it is regarded as compensation for the loss of the wife's legal rights under the marriage contract. Some courts, however, disregard this reason, and award alimony in annulling marriages which are void *ab initio*. *Strode v. Strode*, 3 Bush (Ky.) 227. *Contra*, *Stewart v. Vander voort*, 34 W. Va. 524. Such decisions are unjustifiable, for a void marriage confers none of the legal rights of marriage upon the parties. See *Smith v. Smith*, 5 Oh. St. 32; *Emerson v. Shaw*, 56 N. H. 418. In the principal case the marriage is void, but the plaintiff should have compensation for the defendant's wrong. *Werner v. Werner*, 59 Kan. 399. The compensation should, however, be given as in tort for fraud or deceit, rather than on the broader theory of alimony. See *Pollock v. Sullivan*, 53 Vt. 507; *Withee v.*

Brooks, 65 Me. 14. Though the decision may be correct in result, the principle upon which it is decided is clearly unsound.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — ASSIGNMENT BY QUITCLAIM DEED. — The defendant, a holder of a purchase-money mortgage, quitclaimed all his right, title, and interest in the land to the plaintiff. He then foreclosed and purchased the premises. The plaintiff sued for a conveyance. *Held*, that the defendant must convey. *Gottlieb v. City of New York*, 112 N. Y. Supp. 545.

To constitute an effective assignment of a mortgage the debt as well as the mortgage must be transferred. *Merritt v. Bartholick*, 36 N. Y. 44. In the jurisdictions holding the mortgage a mere chattel interest, security for the debt, a conveyance by the mortgagee of all interest in the land is a nullity and transfers neither mortgage nor debt. *Hill v. Edwards*, 11 Minn. 22; *Nagle v. Macy*, 9 Cal. 426. Even in states retaining the common law theory that the mortgage passes the legal title subject to defeasance, a quitclaim deed by a mortgagee not in possession does not *per se* accomplish an assignment. *Ellison v. Daniels*, 11 N. H. 274. But when the intention to pass the mortgage debt plainly appears such conveyance is held an assignment. *Johnson v. Leonards*, 68 Me. 237. See *Hill v. Edwards*, *supra*. And a quitclaim deed, though passing no legal estate, may operate as an equitable assignment of the mortgage debt to the extent of the purchase money paid. *McSorley v. Larissa*, 100 Mass. 270. See *Lunt v. Lunt*, 71 Me. 377. In the main case whether there has been a legal or an equitable assignment the court reaches a correct result in holding the mortgagee a trustee for the plaintiff of the land purchased.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — DESTRUCTION OF DEFEASANCE AGREEMENT TO CUT OFF RIGHT OF REDEMPTION. — The plaintiff executed and delivered to the defendant an absolute deed as security for indebtedness. Simultaneously the defendant delivered to the plaintiff a defeasance agreement, but neither instrument referred to the other. Subsequently, for good consideration, the instrument of defeasance was surrendered to the defendant and destroyed with the intention of making the deed absolute and cutting off the equity of redemption. The defendant sold the property described in the deed and the plaintiff brought an action to have the deed declared a mortgage and for an accounting. *Held*, that the deed is a mortgage and that the plaintiff may redeem and have an accounting. *Conover v. Palmer*, 60 N. Y. Misc. 241. See NOTES, p. 295.

REAL PROPERTY — MERGER — ESTATES HELD IN DIFFERENT RIGHTS. — The husband of a holder of a term for years bought the reversion in fee. *Held*, that the term does not merge in the reversion. *Hurley v. Hurley*, 42 Ir. L. T. 253. (Ire., Ct. App., Nov. 16, 1908). See NOTES, p. 298.

RULE AGAINST PERPETUITIES — UNCERTAINTY — POSTPONEMENT OF FUTURE GIFT "AS LONG AS LEGALLY POSSIBLE." — A testator gave the residue of his estate to a trustee "for as long a period as is legally possible," to make annual payments to forty-two annuitants and (with three exceptions) to their heirs, and at the end of that time to divide the trust fund equally among the persons then entitled to the annuities. *Held*, that the gift over is valid and vests twenty-one years after the death of the last surviving annuitant. *Fitchie v. Brown*, U. S. Sup. Ct., Dec. 7, 1908.

This decision affirms the decision of the Supreme Court of Hawaii. For a discussion of the case in the lower court, see 20 HARV. L. REV. 220.

SALES — TITLE OF GOODS SUBJECT TO BILLS OF LADING — EFFECT OF INDORSEMENT WITHOUT INTENT TO PASS TITLE. — A seller of goods consigned them to X, and on their arrival they were seized by an execution creditor of the seller. Subsequently, X indorsed the bill of lading to Y, an agent, without value. Y sued the sheriff in trover. *Held*, that he cannot recover. *Burgos v. Nascimento*, 53 Sol. J. 60 (Eng., H. L., Nov. 18, 1908).

Since the indorsement was to an agent and without value, the assumption of the court that there was no intent to pass an interest in the goods seems justified. And the common law rule is that the effect of the endorsement of a bill of lading is limited by the intent of the parties. *Sewell v. Burdick*, 10 App. Cas. 74. A bill of lading, though *prima facie* evidence of absolute ownership in the *bona fide* indorsee, may be explained. *Low v. De Wolf*, 8 Pick. (Mass.) 101. An indorsement in furtherance of a bargain confers an interest sufficient to give the indorsee the right of possession. *Dracachi v. Navigation Co.*, L. R. 3 C. P. 190. But an indorsement to an agent merely for the purpose of stoppage *in transitu* passes no property sufficient to support an action of trover. *Waring v. Cox*, 1 Camp. 369. Likewise a re-indorsement merely for the purpose of getting the goods from the carrier passes no property interest to the second indorsee. *Moors v. Wyman*, 146 Mass. 60. Even under the mercantile view the intent with which an indorsement is made must be considered. *Dodge v. Meyer*, 61 Cal. 405. Under either the common law or the mercantile view, therefore, the decision in the case considered is sound.

SPECIFIC PERFORMANCE — GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF — CERTAINTY NECESSARY IN CONTRACTS TO MORTGAGE. — The plaintiff agreed to lend the defendant a certain sum with which to buy land, upon the latter's promise to give him a mortgage on the land for the sum. No time was fixed for payment of the mortgage debt. The defendant received the money and bought the land. The plaintiff asked for specific performance of the contract. *Held*, that he is not entitled to such relief. *Poole v. Tannis*, 118 N. W. 188 (Wis.).

It is a general prerequisite to granting specific performance, that the contract to be enforced must be so definite in its terms and as to its subject matter, that equity may be reasonably sure of carrying out the intention of the parties. Ordinarily in enforcing contracts in regard to realty, it is required that stipulations as to price and time of payment be very definite. Thus, a contract for the sale of land on credit, which does not fix the time for deferred payments, and a contract to renew a lease at its expiration, the rent to be proportioned to the valuation of the premises at that time, are too uncertain to be specifically enforced. *Buck v. Pond*, 126 Wis. 382; *Pray v. Clark*, 113 Mass. 283. But it has been held that a contract to give a mortgage could be enforced, although no time was fixed for maturity, on the ground that this meant a reasonable time. *Triebert v. Burgess*, 11 Md. 452. The principal case, however, represents the better view and is supported by the weight of authority. *McClintock v. Laing*, 22 Mich. 212; *Milliman v. Huntington*, 68 Hun (N. Y.) 258.

SUNDAY LAWS — NEGOTIABLE INSTRUMENTS — VALIDITY OF PROMISSORY NOTE EXECUTED ON SUNDAY. — The plaintiff sued on a promissory note bearing the date of a week day, but in fact signed and delivered in the mail on Sunday. By reason of the false date, the plaintiff was not aware that the note was executed on Sunday. *Held*, that the plaintiff may recover. *Collins v. Collins*, 117 N. W. 1089 (Ia.).

There is difference of opinion as to whether state statutes prohibiting business on Sunday affect the making of a contract on that day. Where they are construed as aimed primarily at preventing disturbance of the peace, a contract made on Sunday retains its common law validity. *Richmond v. Moore*, 107 Ill. 429. But in the majority of states the statutes are held applicable to Sunday contracts, and such a contract is generally said to be void. *Clough v. Goggin*, 40 Ia. 325. The better view seems to be that, while not strictly void, it is illegal; and therefore the law will not aid one party to it as against the other, where both have notice of its illegality. *Cranston v. Goss*, 107 Mass. 439. *Contra*, *Williams v. Armstrong*, 130 Ala. 389. But where the contract is in the form of a negotiable instrument it is good in the hands of a *bona fide* holder not chargeable with knowledge of the execution on Sunday. *Gordon v. Levine*, 197 Mass. 263. And in extending the *bona fide* privilege to the obligee himself, the main case is clearly to be justified.

SURETYSHIP — SURETY'S DEFENSES: ON GENERAL PRINCIPLES OF CONTRACT — DEFAULT PRIOR TO SURETY'S CONTRACT. — The defendant was surety on the bond of a town treasurer for his second term. The treasurer had defaulted during his first term, but his report made at the end of that term showed an apparent balance on hand. *Held*, that the report is conclusive upon the surety for the second term. *Cowden v. Trustees of Schools*, 85 N. E. 924 (Ill.).

The real breach of the treasurer's duty for which the surety is held is the default and not the false report. But it is argued that the report estops the principal, and therefore his surety, to deny the existence of the reported balance, and so, that the surety is liable as if the misappropriation had occurred during the second term. See *City of Chicago v. Gage*, 95 Ill. 594, 626-632. The basis of estoppel, however, is reliance on a representation resulting in damage. *Smith v. Powell*, 98 Va. 431. In the present case damage could result only if the sureties for the first term were released by the report. But the sureties on a bond cannot be released by mere book entries. *State v. Churchill*, 48 Ark. 426, 450. Otherwise the principal by a false report might defraud his creditors when there was no surety for the second term. There is thus no basis for estoppel. *Goodwin v. State*, 81 Ind. 109. Hence the usual rule, that only sureties on a bond in force when the defalcation occurred are liable, should be applied. To determine when the defalcation occurred the report is *prima facie* evidence but capable of being rebutted. *Bissell v. Saxton*, 66 N. Y. 55.

TAXATION — PARTICULAR FORMS OF TAXATION — ASSESSMENT BY THE FRONT FOOT RULE UNDER THE POLICE POWER. — A municipality levied a special assessment by the front-foot rule on the property of a railroad company for the cost of a public sanitary sewer. *Held*, that the assessment is valid, since special assessments for sewer purposes may be made under the police power, which does not require return to the property owner of proportional benefits. *Chic., etc., Ry. Co. v. City of Janesville*, 118 N. W. 182 (Wis.). See NOTES, p. 293.

TORTS — LIABILITY OF MUNICIPAL CORPORATION — INJURY TO PROPERTY RIGHTS. — A city, while exercising a governmental function, created a nuisance by the use of soft coal, which injured the plaintiff's property. *Held*, that the city is liable, as it cannot take the plaintiff's property without compensation. *Gordon v. Village of Silver Creek*, 127 N. Y. App. Div. 888.

For a discussion of liability where constitutional rights are infringed in the course of a governmental undertaking, see 22 HARV. L. REV. 54.

TRESPASS TO REALTY — NECESSITY AS AN EXCUSE. — The plaintiff while sailing with his family was compelled by a violent storm to moor his boat to the defendant's dock to save the boat and the people in it. The defendant, by his servant, cast off the boat, with the result that it was wrecked and the plaintiff injured. *Held*, that the plaintiff has a good cause of action. *Plouf v. Putnam*, 71 Atl. 188 (Vt.). See NOTES, p. 296.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

- ADVISORY OPINIONS FROM JUSTICES. *Lucilius A. Emery*. Pointing out the objections to the rule in Maine and Massachusetts requiring such opinions. 2 Me. L. Rev. 1.
- ARE NATURAL WATER POWERS PUBLIC PROPERTY? *W. A. Coultis*. Contending that there are no private property rights in natural water powers. 67 Cent. L. J. 356.
- CHARITABLE BEQUESTS. *A. C. Black*. A discussion of Scotch law on the subject. 20 Jurid. Rev. 227.
- COLONIAL APPEALS TO THE PRIVY COUNCIL. *Anon.* Distinguishing between appeals as of right and those as of grace. 53 Sol. J. 27.

- COMMUNICANTS AND THE DECEASED WIFE'S SISTER'S ACT, 1907. *G. A. Ring*. A discussion of a decision in an Ecclesiastical Court construing the act. 34 L. Mag. & Rev. 68.
- COMMUTATION TICKETS AND RATE REGULATION. *Borden D. Whiting*. Contending that certain decisions which hold that the Interstate Commerce Commission may not require special rates for commutation tickets are not sound. 8 Colum. L. Rev. 636.
- DELAYS OF THE LAW, THE. *William H. Taft*. Emphasizing the injustice caused by delay and suggesting remedies. 18 Yale L. J. 28.
- EARLY HISTORY OF THE ATTORNEY IN ENGLISH LAW, THE. *Heinrich Brunner*. 3 Ill. L. Rev. 257.
- EFFECT OF WORDS OF CONDITION IN A DEED. *Albert Martin Kales*. Submitting that whether words amount to a condition or to a covenant should be determined without regard to external circumstances. 3 Ill. L. Rev. 280.
- EMPLOYERS' LIABILITY TO WORKMEN. *Anon.* A comparison of the English and Canadian statutes. 44 Can. L. J. 716.
- EXTENT OF THE JUDICIAL POWER OF THE UNITED STATES, THE. *Simeon E. Baldwin*. Criticizing certain recent dicta which intimate that all judicial power not expressly reserved was given to the Supreme Court by the Constitution, including that commonly regarded as vested in the states. 18 Yale L. J. 1.
- FAR-REACHING DECISION BY THE COURT OF APPEALS, A. *W. A. Purrington*. A discussion of a New York case which holds that a physician's privilege is waived if his patient testifies. 15 Bench & Bar 53.
- GREAT JUDICIAL CHARACTER, ROGER BROOKE TANEY, A. *Charles Noble Gregory*. 13 Yale L. J. 10.
- LAW IN ITS RELATION TO THE CHILD, THE. *Lewi Hochheimer*. 67 Cent. L. J. 395.
- MECHANICAL JURISPRUDENCE. *Roscoe Pound*. Objecting to unreasonable technicalities. 8 Colum. L. Rev. 605.
- NEW YORK CLEARING HOUSE DURING PANIC AND VIEWS ON GUARANTEE BANK DEPOSITS AND CURRENCY LEGISLATION. *Alexander Gilbert*. 6 Law & Com. 381.
- ORGANIC CONCEPTION OF THE TREATY-MAKING POWER VS. STATE RIGHTS AS APPLICABLE TO THE UNITED STATES, AN. *Charles Sumner Clancy*. 7 Mich. L. Rev. 19.
- OUR UNDERPAID JUDICIARY. *Lindsay Russell and Ralph W. Page*. 41 Chi. Leg. N. 144; 12 L. N. (Northport) 168.
- SOME EXPERIMENTS IN DIRECT LEGISLATION. *Robert Treat Platt*. A study of the working of the Initiative and Referendum in Oregon. 18 Yale L. J. 40.
- SOME MODERN APPLICATIONS OF THE WRIT OF PROHIBITION. *John A. Ferguson*. 6 Com. L. Rev. 16.
- SOME NEW ASPECTS OF PARTNERSHIP BANKRUPTCY UNDER THE ACT OF 1898. *Charles M. Hough*. Suggesting that the act gives reason to believe that a partnership should be considered more as an entity than heretofore. 8 Colum. L. Rev. 599.
- TESTAMENTARY POWER UNDER HINDU LAW. *S. Vencatachariar*. 10 Bombay L. Rep. 177.
- WRIT OF HABEAS CORPUS, THE. *Clarence C. Crawford*. A history of the writ. 6 Com. L. Rev. 23.

II. BOOK REVIEWS.

THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES.
By Robert T. Devlin. San Francisco: Bancroft-Whitney Company. 1908.
pp. lxx, 864. 8vo.

This stout volume covers the law of treaties under our Constitution and of cognate subjects arising therefrom. The constitutional provisions are first dealt with; then follow a consideration of the making, taking effect, and termination of treaties; of their construction; of the extent of the treaty-making power; of the legal questions relating to their conflict with national and state legislation; of particular classes of treaties, such as those cession extradition, and with the Indians. The book concludes with chapters on our foreign ambassadors, ministers, and consuls; naturalization and expatriation; respon-

sibility of the government for mob violence; and claims against the government. On many of these topics Mr. Devlin has not, of course, been the first in the field. Mr. C. H. Butler in "The Treaty-Making Power of the United States" has dealt adequately, in 1902, with the history and judicial decisions affecting the treaty-making power in this country; Professor J. B. Moore has covered thoroughly the subjects of extradition and of diplomatic relations in his "Treatise on Extradition and Interstate Rendition," and "Digest of International Law."

The present work, however, is the first volume on this branch of our law which has been published since the recent controversy between the United States and Japan in regard to the right of the Japanese children to attend in San Francisco the public schools to which children of resident citizens of other countries were admitted. This controversy presented two questions: first, the preliminary one whether the right to attend the public schools was a right of residence within the meaning of the treaty and whether there was a deprivation of that right in the segregation of Japanese by the school board; and, second, if this right were established in favor of the contention of the Japanese, did the United States have the legal power to make a treaty which should be superior to the laws of a state? Mr. Devlin gives at length the opinion of the Department of State in support of the superiority of the treaty, and summaries of and quotations from the contemporary expert comment, which, apart from the debates in Congress, generally sustains the same view. Not long ago, we have indicated that the treaty-making power, though in some respects limited, would probably extend to this subject; but we have also suggested that, granting that "rights of residence" included educational privileges, no rights of the Japanese were violated in this case, inasmuch as not only "native citizens" but "citizens of the most favored nation" are constitutionally subject, where appropriate legislation exists, to segregation in schools provided they receive treatment equal to that of pupils elsewhere. 20 HARV. L. REV. 337-339.

The chief merits of the present work must be found in the presentation of the aspects of the main subject which have developed since Mr. Butler's work in 1902; in a somewhat fuller consideration of the topic of construction of treaties than has yet been made; and, generally, in the benefit to the profession through a new development by a qualified and agreeable writer of subjects which have been already skillfully dealt with by other authors.

J. W.

WATER RIGHTS IN THE WESTERN STATES. By Samuel C. Wiel. Second Edition, Revised. San Francisco: Bancroft-Whitney and Company 1908. pp. lxix, 974, 800.

Mr. Wiel's book brings down to a recent date the work of Pomeroy as applied to the Western States, with especial reference to the doctrine of appropriation, a subject which occupies more than half the volume.

Little has been added to the doctrine of riparian right as developed in California, though slight changes in its relations to other sources of title are brought out by late decisions.

The law of appropriation chiefly treated in this book has received its legal sanction in comparatively modern times, though the attempts to gain rights by mere priority of occupation have no doubt been among the earliest of human endeavors. There is some confusion in the use of the word "appropriation." This confusion occurs in statutes and decisions. The Constitution of California, Art. XIV, § 1, declares that "the use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use." The word "appropriated" here means "applied," or "devoted," and does not connote any method of acquisition. *Merrill v. Southside Irr. Co.*, 112 Cal. 426. In *Katz v. Walkinshaw*, 141 Cal. 116, and *Burr v. Maclay Rancho*, Oct. 16, 1908, 36 Cal. Dec. 315, the users of underground water, in the one case coming from artesian wells and in the other case pumped from an underground basin, are spoken of as "appropriators for use on distant lands," though this cannot strictly refer to statute rights, acquired by

priority, to waters "flowing in a river or stream or down a canon or ravine" (Cal. Civ. Code, § 1410), widely as those words have been stretched, and the doctrine of the above cases, though analogous in some of its results to appropriative as against riparian users, is not based on the statute, the court expressly declaring in the Katz case, p. 135, "There is no statute on this subject, as there now is concerning appropriations of surface streams." It is to be regretted that the author does not make more clear the exact meaning of "appropriations."

The illogical character of the principle formerly held, that valid appropriation must be made on public land (*Cave v. Tyler*, 133 Cal. 566), is well shown by Mr. Wiel, but although he notes, he fails to comment on, the view taken in a late case (*Duckworth v. Watsonville*, 150 Cal. 520), that "the right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands, the court using the expression "common law appropriation." This loses sight of the California theory of the historic basis (referred to in the opinion) of appropriation as an implied grant from the United States (Act of 1866, Rev. St. U. S. §§ 2339, 2340), and from the state by the provisions of the Code. The view is squarely opposed to all the California authorities which have passed upon this point. The qualifications, however, contained in the opinion practically confine appropriators of the class indicated to rights ripened by prescriptive user.

Mr. Wiel says that water in an artificial watercourse is personalty. This statement is certainly too broad, if not erroneous. It was contended in the case of *Stanislaus Water Co. v. Bachman*, 93 Pac. 858, that the water right only was realty; the water personalty. The decision in that case holds, "The right to have water flow from a river into a ditch is real property; and so also is the water while flowing in the ditch." This case is supported at least by *Standart v. Round Valley*, 77 Cal. 400, and *Fudickar v. East Riverside*, 109 Cal. 36, whereas the "recent case," *Hesperia v. Gardiner*, 4 Cal. App. 357, relied upon by Mr. Wiel, only actually decided that a water company could sue for water furnished to a customer from its pipes as personalty, a principle admitted by all.

The point is not wholly academic. The question of jurisdiction in suits to quiet title and of the effect of the recording acts may be involved and it is probable that water flowing in a ditch will be considered real estate for these purposes.

While the general conclusions of the author are clear and usually sound, some errors of detail have crept into the work. For instance, several cases where prescriptive right only is involved are cited to show that appropriation may be made on private land. *Hildreth v. Montecito* is cited to show that where persons separately entitled to water form a corporation to distribute it, the use is public. This was the Commissioners' decision, approved in department, reversed and decided to the contrary by the court in bank, *Hildreth v. Montecito*, 139 Cal. 22. Notwithstanding a few such defects, the work is one of great erudition and substantial value.

G. H. G.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXIII. For the year 1908. Select Cases Concerning the Law Merchant. A. D. 1270-1638. Volume I. Edited for the Selden Society by Charles Gross. London: Bernard Quaritch. 1908. pp. cv, 181. 4to.

This volume contains cases from fair, staple, and tolsey courts, the local courts whose main business was the administration of the law merchant. Fourteen of these courts are represented, but five-sevenths of the cases are from the Court of St. Ives. Especial attention is given to this court in the introduction, which deals with the origin, development, and decline of the fair courts. The discussion of the law merchant itself the editor reserves for the second volume, to be made up in the main of cases taken from the King's Bench, Common Bench, and Exchequer.

There is much interesting material in the first volume. We find several illustrations of legal principles which were recognized in the royal courts only

at a much later time; for example, actions for slander (pp. 13, 17, 30, 33, 71, 84, 85); an action strongly suggestive of *Lumley v. Gye* (p. 97); action against a surety upon a simple contract (p. 117); actions by a surety against his principal (pp. 6, 48); actions for breach of contract in not shoeing a horse after entering upon the work (p. 22), or against a barber for discontinuing the treatment of the plaintiff's head (p. 36) or for not building a house of the stipulated materials, (p. 104). A breach of agreement is called a trespass on p. 49. The word covenant (*convencio*) is frequently employed, in accordance with medieval usage, in the sense of oral or unsealed agreement. Usually the judgment for the plaintiff is *in rem*, that he recover. But there are several cases (pp. 17, 22, 24, 30, 37, 48, 59) in which the judgment is *in personam*, that the defendant make satisfaction to the plaintiff. We shall hope soon to see the second volume. The material of the two volumes, supplemented by the learned editor's discussion of the law merchant, will surely be a valuable contribution to our knowledge of English legal history.

J. B. A.

THE LAW OF TENDER. By George Lucas Beynon Harris. London: Butterworth and Co. 1908. pp. lxx, 415. 8vo.

As the author points out in his introductory remarks, the law of tender is adjective in its nature, accessory to the law of obligation. As the obligations of contract became abstruse, its tenacious attendant developed correspondingly, so that the cases involving tender present a department of legal learning inevitably technical in the highest degree. Of the value of such a special book as this there can be no doubt, but it would be incomprehensible to one not intimately familiar with the substantive law upon which it depends. As to the ordinary rules stated in the chapter headings, there can be no doubt,—that tender must be fully declared and insisted upon, that it must be in lawful coin actually produced, that it must be unconditional and without reservations, that it must be kept good and produced in court, that it must be made at the right time and appropriate place, that it must be made by a proper person to a proper person. But to know what is a right time and who is a proper person one must know the law of the particular obligation in question so thoroughly that he might almost deduce the actual law of tender for his case without consulting the special cases on tender. Still, as our law is at best an imperfect science, no lawyer would be safe in trusting to his own deductions, but should have recourse to some authoritative source. It would be well if we had for our American law such an excellent special treatise as Mr. Harris has made from the English decisions.

B. W.

THE JUSTICE OF THE MEXICAN WAR. By Charles H. Owen. New York and London: G. P. Putnam's Sons. 1908. pp. viii, 291. 8vo.

"The Justice of the Mexican War" cannot be considered a law book, nor is it a history; for it does not even attempt to bring men and events of earlier times to life before the reader. It deals rather with cold facts simply in their bearing upon the justice of the Mexican War. In so weighing the right and wrong of international relations it may, not inappropriately, be reviewed in this magazine. Mr. Owen's purpose is to disprove the truth of the very general statement of historians that the Mexican War was a mere trick to steal or perhaps an open stealing of territory from a weaker nation, in order to gain more states for slavery and a port on the Pacific. His arguments may be very briefly indicated as follows: (a) He summarizes the American character and American ideas of civil rights of the time just before the Mexican War; the character of the American settlers in Texas and their relations with people in the United States; the Mexican ideas of civil rights and particularly their control of the Texan territory. From these facts he finds that intervention by the United States in the case of Texas was far more clearly justified than in the case of Cuba, where

our intervention, according to a quotation from Professor Woolsey, was justified "by the burden of neutrality, the dictates of our commercial interests, and the call of humanity." We may not all agree that intervention in Cuba was justified; but expansion, or imperialism as it is now called, which aims to give better government to new territory acquired, whether wise or not, is at least less immoral than conquest to spread slavery. So far the argument applies more strongly to Texas than to the comparatively unsettled California. (b) But there is still another motive advanced for the war. Mr. Owen assembles a rather formidable array of authorities to show that there was real danger, not a mere convenient fear that Texas and California would be virtually controlled by England or France, or at least, Mr. Owen maintains Americans would have had many reasons honestly to believe that to be the case. Since Mexico could not control these territories, intervention by the United States was therefore a defense of the Monroe Doctrine, and when the Monroe Doctrine is applied to territory as near and as important to that of the United States as Texas or California was, it can hardly be called highly immoral. (c) And besides these two constructive arguments furnishing motives for the Mexican War which may have been at least honest, Mr. Owen collects some very interesting facts which tend to show the negative of the general statement that United States officers sent overbearing messages to Texas, acted dishonestly with regard to boundaries, and did other things which lend color to the theory that the war was forced on Mexico to gain more slave territory. Mr. Owen's contention that great historians have in these cases followed theory rather than facts has more force than can be attributed simply to the desire of the American readers to believe that his country was not to be despised.

Not all of Mr. Owen's points and suggestions can be noticed here, nor any of them carefully weighed. But there is space for a little broader criticism of his work. American history is not yet so old that we can be sure that we have an impersonal point of view. In another case it was left for John Fiske to show that among the Tories at the time of the Revolution there were many honorable and heroic men. And that the patriots fought for independence against such men, rather than scoundrels only, is no discredit to the patriots. So in the present case it may be that those who tried to spread slavery were not all dishonest and that in the Mexican War they acted from honest motives. If this volume prompts some historian to weigh all the evidence and give a true, unbiased history of the Mexican War times, it will have fulfilled, as the author says on his closing page, one of its most important purposes. P. K.

POWERS OF THE AMERICAN PEOPLE. By Masuji Miyakawa. Second edition. New York: The Baker & Taylor Company. 1908. pp. xiv, 431. 8vo.

The first edition has been revised and enlarged. Covering such a wide field of investigation, the author does not profess within the limited space to treat his subject exhaustively as does Bryce in "The American Commonwealth," but in presenting a comprehensive study of the Constitution and its workings he shows a remarkable insight into American institutions. He considers separately the powers of the American people, Congress, the President and the courts. Enough constitutional history is gone into to show the origin of the particular power treated, and the substance of the decisions, with apt quotations, construing it is set forth. The contrast with similar powers in the governments of Europe and Japan makes the work particularly instructive for foreign readers, especially the Japanese. The book is more than a survey of American constitutional government; it presents a general picture of the American nation. In many respects this is a picture of what we ought to be rather than what we are. The scholarly and interesting treatment should appeal not only to the student of government and law but to the general reader.

In the appendices are printed the Magna Charta, Constitution of Japan, Declaration of Independence, Articles of Confederation, and Constitution of the United States.

R. T. H.

FRANCE AND THE ALLIANCES. By André Tardieu. New York: The Macmillan Company. 1908. pp. x, 314. 12mo.

The substance of this book M. Tardieu set forth in the Hyde lectures at Harvard in 1908; and the book itself displays both the defects and the excellencies of a series of brief lectures upon so broad a subject. Being not only a brief but a popular presentation of French world-politics, it naturally takes the form of a quick, stimulating, suggestive review and survey rather than a close and substantial study. The English of the book would suffer severely by comparison with the French of the original lectures.

M. Tardieu is not an impartial historian. As he says in his preface: "A Frenchman could not treat such a subject otherwise than from a French point of view." And this French point of view is, if not exactly hostile, at least opponent at all points to the German. The book is chiefly an account of the diplomatic struggles by which France, crushed by the war of 1870, has sought to regain political and military equality with Germany. In this, M. Tardieu believes, she has to-day succeeded.

Against the unwavering, Bismarckian determination of Germany to isolate France though the formation of a Triple Alliance of Germany, Austria, and Italy, — accompanied by the estrangement from France of Russia, England, and Spain, — France has one by one added to her list of treaties, ententes, and rapprochements, with powers other than Germany, till now any move by Germany to reduce France again to her old political inferiority is met by a combination of powers determined to maintain the present equilibrium.

On the surface this result is a triumph of diplomacy, a skillful playing of the world-game of politics. But underneath this aspect of the matter, to which, perhaps, M. Tardieu gives too single an emphasis, the reader may trace the economic causes which have lifted France to a place of new influence. The French are a saving, continent, industrious people. They have little by little become the bankers of western Europe. Russia is France's closest ally. France finances Russia. Italy's old hatred for France is softening. French capital is building the new industrial Italy. And so on, almost without end. Political guarantees have followed hard on the heels of commercial interdependence.

It is for this revelation of the subservience of world-politics to world-economics that the book is likely to prove most interesting. H. S. D.

THE NEGOTIABLE INSTRUMENTS LAW. By John J. Crawford. Third Edition. New York: Baker, Voorhis and Company. 1908. pp. xlviii, 212.

This volume contains the text of the act together with annotations by the drafter of it. As the number of states that have adopted the act increases (the number is now thirty-five), and as lines of decisions under its various sections are coming into existence, new editions of a work of this nature are very welcome. The annotations contain references to the state of the law before the adoption of the act, citations of cases decided under it with brief statements of their holdings, and occasionally supposititious cases to illustrate the rules laid down in the text. The annotations vary in length from four pages on some sections down to nothing at all on others. This book will undoubtedly be of assistance to the practitioner, and also to one grappling with the act as a student. It is to be regretted, however, that the author did not give greater consideration in his annotations to some sections concerning the interpretation of which controversy has already arisen, as the liability of unauthorized agents under § 39 according to the notation of the New York statute, or § 20 of the Commissioner's draft. See 20 HARV. L. REV. 159. E. H. G.

IDEALS OF THE REPUBLIC. By James Schouler. Boston: Little, Brown and Company. 1908. pp. xi, 304. 12mo.

In the words of the author the purpose of this volume is to trace out those fundamental ideas, social and political, to which America owes peculiarly her progress and prosperity, and to consider the application of those ideas to present conditions. Professor Schouler writes from the vantage ground of ripe years, and with the pleasant moderation of one who sees the strength of our country in its equality of opportunity and in neighborly living, who disapproves of automobiles, and would carry us back to the life of the men who signed the Constitution, in whose time ostentatious travel was with a coach and six. He reminds us of the political doctrines upon which our government was set up and considers how our political life has developed in relation to them. Throughout, he insists upon those theories of the Founders of the Republic. He may, in casting up his account of political America, reckon in with favor referendums and patent voting-machines as new devices in governmental practice. But that perhaps social and economic changes of the nineteenth century are to have their effect on political theory he does not hint.

The book opens with a discussion of the natural rights of man, asserted in the Declaration of Independence, particularly of equality, and then passes to a consideration of the civil and political rights flowing from them. The doctrine of consent, underlying all American political theory, and that characteristic contribution of America to political science, the written constitution, are next recalled to our attention. And then what the author names the federo-national nature of our central government and the consistent independence in political action of its three great divisions of legislature, executive, and judiciary. Upon present-day political parties he directs a criticism such as might have been expected from so good a Jeffersonian. Finally, in the Strife to Surpass, dealt with in the last chapter, Professor Schouler sees the explanation of our American social conditions and their difficulties.

N. K.

MINING LAW AND LAND OFFICE PROCEDURE. By Theodore Martin. San Francisco: Bender Moss Company. 1908. pp. lxiv, 980.

This is a text-book on a subject that assumes considerable importance in the so-called "Mining States." The acquisition of title to mineral lands of the public domain under the Mining Laws of Congress is only possible in these Western states, and it is with this particular phase of the Mining Law that the book in question is primarily concerned. That branch of our mining jurisprudence which deals with the regulation of mining operations and collateral questions such as arise in connection with the conduct of mining in the Eastern states and those of the Middle West, is not treated in this work. Part I, consisting of 320 pages, is taken up with a discussion of "General Principles" and is the author's treatment of the subject. Part II, comprising 386 pages, is a verbatim presentation of federal and state statutes and Land Department regulations. Part III, embracing 112 pages, is devoted to "Forms."

The disproportionate amount of space allotted to a literal quotation of legislative enactments in Part II, and the undue prominence given them, detracts from the value of the work and suggests the idea of "padding." The author should have devoted more space to text matter and relegated statutory provisions to an appendix. The forms presented in Part III contain many helpful suggestions.

The author is very candid in his preface, and says, "No effort has been made to make the work a treatise, but rather to state the law and tell where it can be found," and he "believes and hopes that the book will possess at least one merit, that of being abreast of the times." It is to be regretted that the work does not entirely fulfill this prediction. That portion of the work which is devoted to a discussion of "principles" has the appearance of being a digest of decisions loosely thrown together. As a consequence, there are instances of needless repetition and many of the propositions stated are out of their logical

order. Subjects of relative unimportance are given undue prominence, and there are some erroneous and inconsistent statements resulting from blindly following cases. In places the language employed does not clearly express the proposition set forth, and gives rise to a doubt as to whether the author appreciated the refinements of this branch of the law in certain instances. The citations are incomplete, the author often satisfying himself with citing one or two cases, which are not always the leading cases or the latest judicial expressions on the subject. The author's frank prefatory statement does not lead one to expect a profound treatment of the subject, but it does lead one to expect a careful and comprehensive citation of authorities. The title of the work would imply that the subject of Land Office Procedure had received special treatment, and while considerable space is devoted to the subject, it is by no means as exhaustively or elaborately presented as one is led to expect.

A conspicuous example of inaccuracy is contained in § 106, where the statement is made that "mineral surveyors . . . are disqualified from making a valid location." The case of *Lavagnino v. Uhlig*, 26 Utah 1, is correctly cited in support of this proposition, but in note 26 this case is referred to as being affirmed in 198 U. S. 443, the inference naturally being that it is an authority on this particular point. As a matter of fact, the federal court explicitly avoided passing on this question. The author overlooks the case of *Hand v. Cook*, 92 Pac. 3 (Nev.), which is flatly opposed to the Utah decision, thus leaving the question at the present time "in the air." The mention of the *Lavagnino* case calls attention to the fact that the author fails to cite the 198 U. S. decision in his discussion of the subject of re-location, which was the basic question decided by the case. While the decision in the case of *Farrell v. Lockhardt*, 210 U. S. 142, overruling the *Lavagnino* case, was probably rendered too late to appear in this book, yet one wonders why the former case was ignored on this point, since it has provoked more discussion than any other recent mining decision.

Again, the author's discussion of the very important subject of "Apex" in § 323 is meager and not wholly accurate. His definition of an apex as "the part of the vein which approaches nearest the surface," while applying to the majority of cases, is not true in some instances, as was established in the cases of *Duggan v. Davey*, 4 Dak. 110, and *Gilpin v. Sierra Nevada Cons. M. Co.*, 2 Idaho 662, where the outcrop occurred on the dip of the vein, on the side of a mountain.

The book, while possessing the defects noted, is not without merit, and has a certain value for practitioners, inasmuch as it cites many late cases and contains recent state statutes.

H. W. B.

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THE CAPITAL OF A CORPORATION.

THERE has been much discussion of late concerning the alleged evil of over-capitalization of corporations, and a marked tendency to ascribe to this cause a great part of the ills which are charged to large corporate activities.

The human mind ever delights in the discovery of some one definite cause for troublesome conditions, and willingly accepts, often without too close inquiry, theories which are simple in statement, and easily, if but superficially, understood. Therefore, when judges and writers on economic subjects assert that one of the greatest evils from which those dealing with corporations have suffered is over-capitalization — the issue of shares of capital stock to an amount in excess of the value of the capital assets¹ — the statement is gladly accepted, and constitutional conventions, legislatures, and courts vie with each other in declarations against "watered stock," "inflated capital," or "excessive or fraudulent over-capitalization."

The theory underlying these declarations is, that the issue by a corporation of shares of its capital stock, of a specified face or par value, to an aggregate amount in excess of the actual capital of the corporation, is a fraud upon the public, for which the parties to the fraud should be held liable. Granting the premises of this theory, the conclusion may be readily accepted. But the more serious

¹ "And in view of the fact that 'watered' and 'bonus' stock is one of the greatest abuses connected with the management of corporations," per Mitchell, J., in *Hospes v. N. W. Mfg. & Car Co.*, 48 Minn. 174, 196.

question remains, what is the capital of the company which is represented by its share certificates, and what are the obligations with respect to such capital which are assumed by the subscribers to, or purchasers of, shares of capital stock?

It makes comparatively little difference to those dealing with a partnership what the members of the firm may have fixed as the firm capital, for not only the firm assets, but all of the individual property of the partners (remaining after payment of their respective personal creditors) is liable to the claims of firm creditors.

But the main object of incorporation for business purposes is to escape this liability, and to limit the possible loss of the associates to the amount contributed or agreed to be contributed by them to the corporate capital.

A recent lecturer in the Harvard Graduate School of Business Administration¹ has formulated the following definition of capital:

"Capital, considered either as a social and economic or as a business concept, must be viewed as the assets of a going concern, acquired and set aside for productive use."

The general idea of *corporate* capital running through the statutes of the various states is, the amount specified in the Articles of Association as the capital or capital stock of the corporation, which is to be paid in or contributed to it, and to be represented by shares, the holders whereof shall have the right to participate in the net earnings distributed during the corporate life, and to divide among themselves on dissolution all assets remaining after the payment of the corporate debts.²

Where it is agreed that this capital fund shall be contributed in cash, the matter is very simple. The amount either has or has not been paid, a fact which may be easily ascertained. Until it is actually paid, those who have agreed to pay are liable to do so, unless the law governing the corporation permits them to devolve that liability upon their transferees. The capital stock of the corporation in that case would be made up of (1) the cash paid in; (2) the unpaid balances which the subscribers have agreed to pay.

But in many instances, the capital which is to serve as the basis

¹ Cleveland, F. A., Lecture XIII, p. 210.

² E. g., "A stock corporation is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation." N. Y. Genl. Corp. Law, § 3.

of the corporate enterprise consists in whole or in part of property, real or personal, or both. It may include copyrights, patent rights, trademarks, good-will, and other "intangible" but valuable property the ownership of which may be the basis of large earning capacity. When all these things are brought in under one ownership and control, the aggregate value may be much more than the sum of the values of the different component parts, separately considered. This added value may have been produced through the efforts of one or more persons who have succeeded in bringing these different elements together, and who are willing to take their compensation in the form of shares representing an interest in the combined capital, thus making their ultimate compensation dependent upon the accuracy of their forecast of the results of the enterprise.

The French law declares that every member of a corporation is a debtor to the corporation for all that he has promised to contribute, such contributions (*apports*) being (1) in money, (2) in kind; and that the sum of these contributions shall constitute the capital stock.¹

It must be confessed that American statute law and the decisions of American courts have dealt most inadequately with these conditions.

While most courts recognize that as between the corporation and one who has agreed to transfer or convey property to it in exchange for shares of stock, the latter can only be held liable to contribute what he has agreed to; yet a new and different liability, not resting on contract, but created by judicial construction of statutory provisions, and even by applying so-called equitable principles, independently of statutes, has been asserted and enforced in favor of creditors of the corporation.

This liability is not fixed and definite: it is based upon very different and conflicting legal theories, and the bases of its enforcement are so uncertain that in many cases it would be impossible to advise that the holders of stock issued for property might not be held liable to creditors in the event of the future insolvency of the company, no matter how honest the organizers of the corporation might be in their judgment, nor how careful in their estimate of the value of the property acquired as part of the corporate capital.

¹ 2 *Traité de Droit Commercial* CH. Lyon-Caen et Renault (Paris 1898), p. 12, § 559, p. 397, § 33, p. 25.

This uncertainty in the law has arisen largely through the efforts of the courts to improve on the work of the legislature in cases where the legislative rule seemed inadequate.

It may be doubted whether this effort has been justified by the results attained, and whether the uncertainties and inequalities in the law caused thereby do not constitute a greater evil than that which occasioned the effort at redress.

In the case of corporations operating public utilities, the public has undoubtedly a legitimate interest in the amount of capital stock which may be issued, and the value placed by the organizers upon property acquired as a basis for stock issue, because the reasonableness of rates charged the public for the use of the utilities operated may depend to some extent upon the actual amount of legitimate capital invested in the enterprise, and on which the corporation has concededly the right to earn a fair return.

But, *a priori*, there would seem to be no reason why the incorporators of an ordinary trading or business corporation should not ascribe any value they please to property with which they propose to engage in business, for the purpose of fixing the amount of the capital stock, nor why they should not give an interest in that capital by the issue of certificates representing shares therein to those who may have promoted or brought about the organization, so long as they do not deceive the public or those who may have to deal with the company, either by misrepresentation or suppression of the facts.

The statutes in a number of the states are, however, framed on a different theory, and even where they are not, courts have supplemented them by inventing new grounds of liability in cases where the valuation of property, reviewed after insolvency, has been regarded by the courts as in excess of what should have been the valuation at the time of its acquisition.

Perhaps the greatest uncertainty, and the extremest interference with the finality of the valuation put by the stockholders and directors of a corporation upon property contributed to its capital, exist in New Jersey, — the last state where such conditions would be looked for; the favorite jurisdiction for the formation of large corporations or "trusts."

The General Corporation Law of New Jersey¹ provides that "nothing but money shall be considered as payment of any part

¹ Laws of 1896, § 48.

of the capital stock of any corporation organized under this act, except as hereinafter provided in the case of the purchase of property." "Hereinafter,"¹ it is provided that such a corporation may purchase property necessary for its business,

"and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive."

In *Donald v. American Smelting Co.*² the Court of Errors and Appeals (speaking by Dixon, J.) construed these sections in the following language:

"The meaning of section 48 is not questionable. The money must equal the face value of the stock. The language of section 49 is even more explicit. The corporation may issue stock *to the amount of the value* of the property. The value of the property in the one case, just as the value of the money in the other, must at least equal the face value of the stock.

"The distinction between the contemplated issue of corporate stock for property and its issue for money lies, not in the rule for valuation, but in the fact that different estimates may be formed of the value of the property. When such differences are brought before judicial tribunals, the judgment of those who are by law entrusted with the power of issuing stock, to the amount of the value of the property, and on whom therefore is placed the first duty of valuing the property, must be accorded considerable weight. But it cannot be deemed conclusive when subjected to judicial scrutiny. *Nor is it necessary that conscious over-valuation or any other form of fraudulent conduct on the part of these primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination into the elements of value, or if based in part upon an estimate of matters which really are not property, or if plainly warped by self-interest, may lead to a violation of this statutory rule as surely as would corrupt motive.*"³

This decision in effect repeals the statutory rule that the judgment of the directors shall be final except in case of *actual fraud* in the transaction, and substitutes for it the rule that the judgment of the directors is not conclusive if the court shall find that

¹ § 49.

² 62 N. J. Eq. 729.

³ Pp. 731-2. The italics are the writer's.

their appraisal was made, either (1) without *due* examination — that is, without such examination as the court may deem should have been made — into the elements of value, or (2) upon the basis of matters which the court considers were not proper elements of value, or (3) if, although entirely honest, in the opinion of the court, the judgment of the appraisers might have been warped by self-interest.

In the later case of *Easton National Bank v. American Brick & Tile Co.*,¹ it appeared that a number of gentlemen, including two of the Justices of the Supreme Court of Pennsylvania, in the year 1886 had formed a corporation under the laws of New Jersey to exploit a patented process for making bricks from slate refuse, with a capital stock of \$1,000,000, which was to be issued in consideration of the transfer to the corporation of the patents and \$25,000 cash. It was a part of the agreement for the formation of the company, that after the stock was issued certain of the subscribers should contribute stock to the amount of \$55,000 par value to be used for sale to raise working capital for the company. In 1905, in this suit, brought by the receiver of the corporation, which had become insolvent, the Court of Chancery held that there was "an intentional over-valuation of the property, upon the understanding that a portion of the stock issued should be returned for distribution among the directors voting for the purchase without payment by them," and that this constituted "actual fraud" within the meaning of the statute. It seems to have been assumed by the court that the patents were not worth \$1,000,000, largely because no evidence was introduced to show that they had that value. The minutes of the corporation contained no record of the determination of the board of directors to purchase the patents and issue all the capital stock in payment therefor, and the testimony of the witnesses that it had been determined to issue the stock for the patents, and as to a resolution "the contents and purport of which depend upon the recollection of busy men engaged in large and most important enterprises given nearly seventeen years after its adoption," failed to satisfy the Vice-Chancellor "that there was distinct official action by the directors fixing the value of the property and determining that all of the capital stock should be issued to the patentees in payment for their patents." No presumption of regularity in the issue after this period of seven-

¹ 69 N. J. Eq. 327; on appeal, 70 N. J. Eq. 722.

teen years was indulged in. And so the court was of the opinion "that the issue of this stock as full paid, while good as between the parties to it, was a contract made by the company with its stockholders in derogation of the rights of creditors, which should be set aside, and the holders of the stock" [*i. e.*, the original subscribers to it, and the personal representatives of those who were dead] "decreed to pay on account of their holdings, in addition to what they have paid in cash, a sum sufficient to liquidate the debts of the company."

In the Court of Errors and Appeals¹ this liability was affirmed, even (in this respect overruling the Vice-Chancellor) in favor of an executor of a deceased director in and president of the defendant corporation, the executor being himself a creditor in his individual capacity, and its secretary and treasurer at the time the stock was issued; and although the court found "that each of them, at the time they became creditors, knew the exact condition of the company, and knew that the stock in question was not issued for property at its value, as it purported to be." This conclusion was based on the principle that under the New Jersey Corporation Act of 1875 the stockholder's liability to creditors did not depend on the *trust fund* theory or on the theory of *holding out*, but, as Pitney, J., said:

"It depends upon the stockholder's voluntary acceptance, for consideration touching his own interest, of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien, and which requires stock subscriptions to be made good for the benefit of creditors of insolvent companies, without distinction between prior and subsequent creditors, or between creditors who had notice and those who had none."²

A different rule was adopted by the United States Circuit Court of Appeals for the Third Circuit in the case of *Sternbergh v. Duryea Power Co.*³ The defendant there was incorporated under the laws of Pennsylvania⁴ which authorized it to acquire patent rights and issue stock "*to the amount of the value thereof.*"

The court held that having taken certain patents at a valuation to which every person in interest agreed, and having enjoyed them for seven or eight years, neither the company nor its trustee in bankruptcy could repudiate the transaction and assess or collect on the full-paid stock which was issued for such patents.

¹ 70 N. J. Eq. 722.

³ 161 Fed. 540.

² P. 739.

⁴ Act of 1874, P. L. 81.

In *See, Receiver v. Heppenheimer*,¹ the foregoing decisions of the New Jersey courts were applied in even more sweeping language. The Vice-Chancellor (Pitney) expressed the opinion that the intention of the legislature expressed in sections 48 and 49 of the Act Concerning Corporations (Revision of 1896) was

"that the capital stock of all corporations should at the start represent the same *value* whether paid for in property or money." "That result," he said, "can only be obtained by supposing that the property is to be appraised at its actual cash value, precisely as if a board of directors with the whole capital stock actually paid in cash is dealing at actual 'arms-length' as real purchasers with the owner of property proposed to be purchased as a real vendor without any interest in the directors to overvalue the property, or other interests inconsistent with the real interest of the stockholders as such. . . .

"After all, it seems to me that the true test, under this statute, as applied to the case here in hand, is this: if the company actually had to its credit in the bank the sum of \$5,000,000, would it have been willing to have paid that price in cash for the property in question for the uses and purposes to which it proposed to devote it; would the property be worth that sum in cash to the company?"²

If such test should be applied to all the corporations organized under the laws of New Jersey during the past ten or fifteen years, a very considerable number would no doubt be found to have their capital stock not fully paid, and the stockholders, to their great surprise, liable in the event of insolvency for the debts of the corporation.

The Court of Chancery in New Jersey has held

"that a *bonâ fide* transferee of stock, the certificate for which recites that it is full paid, is not liable to make good the contract of the original subscriber, if the transferee has no knowledge that the subscriber has not paid in full nor notice of any fact from which knowledge may be inferred, or which requires him to inquire as to the truth of such statement."³

But a liability based on the application of the rule in the *See* case⁴ was there enforced against defendants, no one of whom had made an actual subscription to the stock of the company, but who, having accepted stock without paying for it—*i. e.*, without

¹ 69 N. J. Eq. 36.

² Pp. 55-6.

³ *Easton N. Bank v. Am. Brick & Tile Co.*, 69 N. J. Eq. 327, 334.

⁴ *Supra*.

paying in property which the court considered to be of equivalent value — were held to be in the position of subscribers.¹

The United States Circuit Court of Appeals in the Second Circuit has also held that where stock is issued in form as full paid and non-assessable; and is purchased in good faith, in reliance upon such form, as well as upon representations made by the manager of the company that it had been issued for property and was full paid, such purchasers would not be liable to contribute towards the indebtedness of the company, even where it appeared that, as a matter of fact, the stock was issued for much more than the value of the property.²

“The doctrine of the best Courts, English and American,” says Judge Seymour D. Thompson,³ “founded on the most obvious conceptions of justice and commercial convenience, now is that where the shares of a corporation are offered for sale by the person named in the certificate, an intending purchaser is not required to look beyond the recitals of the certificate in regard to the title of the vendor or the equities of the corporation, or to suspect fraud in the issuing or payment of the shares, where all seems fair and honest; nor is he bound, for any such purpose, to make an examination of the books of the corporation.”

But this rule is not of universal application, and in some jurisdictions even unsuspecting purchasers in good faith of shares of stock issued for property and purporting to be full paid and non-assessable have been held liable to contribute to the indebtedness of the company, or the stock to be void even in the hands of an innocent holder.⁴

The New Jersey courts not only refuse to recognize any finality in the judgment of the corporate organizers, stockholders, and directors, under their own statutes, but they even decline to accept as conclusive the provisions of statutes of other states authorizing the members of corporations to themselves finally determine the value at which they will accept property contributions to the corporate capital.

In *Johnson v. Tennessee Oil, etc., Co.*,⁵ a suit brought in New

¹ P. 78.

² *Re Remington Automobile and Motor Co.*, 153 Fed. 345.

³ 36 Cent. L. J. 96.

⁴ See *Lake St. El. R. R. v. Ziegler*, 99 Fed. 114; *Smith v. Association*, 123 Ala. 538; *Kellerman v. Maier*, 116 Cal. 416; *First Avenue L. Co. v. Parker*, 111 Wis. 1.

⁵ 69 Atl. 788.

Jersey to collect the amount of a judgment against an Arizona corporation from its stockholders, on the ground that the stock had been issued for property at a gross over-valuation, it appeared that the statutes of Arizona under which the defendant corporation was organized, empowered bodies corporate to exempt the private property of members from liability for corporate debts; that the stock was in fact issued to all of the defendants as full paid and non-assessable, and was all issued and received for property purchased at a valuation agreed on by the incorporators, who at the time of the purchase constituted the board of directors and the only stockholders of the company. No decisions of the Arizona courts were cited on the construction of the statutory provision above referred to, but Vice-Chancellor Emery held that

"On this point I follow what seems to be the plain result of the language of the statute and the charter authorized under it, and conclude that the private property of the defendant stockholders whose stock was issued and received as full paid cannot be taken to pay the corporate debt under this execution."¹

Notwithstanding this clear recognition of the "plain result of the language of the statute," the court went on to say:

"For a *fraudulent* use of the statutory and charter provisions by the issue of stock for property at a *fraudulent* over-valuation, the holders of stock so issued would, however, remain subject to liability to creditors, under the equitable principles generally referred to as the 'trust fund' theory of capital stock. The capitalization in this case was so grossly excessive as to be fraudulent, and the plaintiff would be entitled to relief on this ground of fraud but for the fact that he was a subsequent creditor with full notice of the fraudulent over-valuation."²

This reason for the rule, which gives rise to the last-mentioned exception, is, he says,

"that the right to relief, independent of any statutory provision, so far as it depends upon general principles of equity bearing on the 'trust fund' theory of capital stock, must be based on the creditor's reliance on supposed paid-up capital when the liability was incurred."

Although the learned judge admits that

"the ultimate liability of a stockholder in a foreign corporation for payment of corporate debts depends on the law of the state of incorporation, not on

¹ P. 791.

² P. 791.

the law of the forum, the control of which goes no further than the remedies for enforcing the liability."¹

This decision was rendered before that of the Court of Errors and Appeals in *Easton National Bank v. American Brick & Tile Company*,² which overthrew the entire basis of Vice-Chancellor Emery's judgment, and as above shown, repudiated the "trust fund" theory, and asserted that the stockholder's liability to creditors did not depend on the theory of "holding out," but upon his voluntary acceptance "of a statutory scheme to which watered stock, under whatever device issued, is absolutely alien" — a scheme, be it remarked, which judicial alchemy evolved from a statute authorizing the issue of stock to pay for property, which stock should be full paid and non-assessable, and declaring that "*in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive.*"

Perhaps no judicial invention has given rise to as much discussion, or has more unsettled the law than the so-called "*trust fund*" doctrine concerning capital stock.³

In the series of cases growing out of the insolvency of the Great Western Insurance Company, an Illinois corporation, the Supreme Court of the United States held that the original holder of stock in a corporation is liable for unpaid installments of stock *without an express promise to pay them*, and that a contract between a corporation or its agents, and the purchaser of stock, limiting his liability therefor is void, both as to the creditors of the company and its assignee in bankruptcy; and that representations by the agent of a corporation as to the non-assessability of its stock beyond a certain percentage of its value constitute no defense to an action against the holder of the stock to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations.⁴

¹ P. 791.

² 70 N. J. Eq. 722, cited *supra*.

³ See *The Trust Fund Theory of the Capital Stock of a Corporation*, by Geo. W. Pepper, 32 Am. L. Reg. N. S. 175; "Capital Stock as a Trust Fund," by Judge Stevenson Burke, 1 West Res. L. J. 5; "Is Unpaid Capital a Trust Fund in Any Proper Sense?" by R. C. McMurtrie, 25 Am. L. Rev. 740; "The Law of the U. S. Supreme Court as to Capital Stock not Fully Paid," by Thomas Thacher, 25 Am. L. Rev. 946.

⁴ See *Upton, Assignee v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 65.

In *Sanger v. Upton*, Swayne, J. said:¹

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. . . . It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

In *Coit v. Gold Amalgamating Co.*² the court held that actual fraud in the issue of stock for property would entitle creditors to call the stockholders to account, and that gross and obvious over-valuation of property would be strong evidence of fraud.

In *Handley v. Stutz*³ Mr. Justice Brown said:

"Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as full paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. . . ."⁴

"The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent of which it fails to represent such value, it is either a deception and a fraud upon the public, or an evidence that the original value of the corporate property has become depreciated."⁵

"If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be 'watered' except the caprice of the stockholders."⁶

¹ At p. 60.

² 139 U. S. 417.

³ See p. 428 and following paragraph.

⁴ 119 U. S. 343.

⁵ P. 427.

⁶ P. 428.

But the application of these views was limited by the court to the *original* issue. As to stock *subsequently* issued, Mr. Justice Brown said:

"The case then resolves itself into the question whether an active corporation, or, as it is called in some cases, a 'going concern,' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained."¹

This question the court answered in the affirmative:

"The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase is made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger or more profitable business, such subscriber would stand practically on the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained."²

The *decision* in the case was that while persons to whom stock was issued as a mere *bonus* — *i. e.*, without any consideration whatever — were liable to the extent of its par value for the debts of the company, holders of stock issued with bonds as a part consideration for the purchase of the bonds and without which the purchasers would not have bought the bonds, were not so liable.³

It is difficult to reconcile this decision with Mr. Justice Brown's statement that

"The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation in some form the amount represented by it."⁴

For if the creditors have any such right, there would seem to be no basis for any distinction between the original issue and any sub-

¹ P. 429.

² P. 430.

³ P. 435.

⁴ *Contra, vide* Welton v. Saffery, [1897] A. C. 299; Ooregum G. M. Co. v. Roper, [1892] A. C. 125; Wall v. Utah Copper Co., 70 N. J. Eq. 17; Vermont Marble Co. v. Deelee Co., 135 Cal. 579.

sequent issue. In fact the great weight of authority is against any such distinction.

But, at all events, the *decision* qualifies the basis for this "wholesome doctrine," by limiting the permitted reliance of the creditors to the *original* stock issue. As to *subsequent* issues, neither they nor the purchasers of the stock can tell what rights the creditors may have with respect thereto. They would depend upon proof of the circumstances under which the stock was issued, and whether or not the court should conclude that it was issued "merely for the purpose of adding to the original capital stock of the corporation and enabling it to do a larger or more profitable business" — in which case the stockholder would be liable to pay up the difference between what he had paid in on the stock and its par value; or that it was issued by "an active corporation" "for the purpose of paying its debts and obtaining money for the successful prosecution of its business," and was disposed of for the best price that could be obtained.

No logical basis for this distinction is stated by the court, and if there is a legal presumption that every dollar in par value of stock issued represents a dollar in cash or a dollar's worth of property in the corporate treasury, — which is really the foundation of the so-called "trust fund" theory, — then the purchaser of stock from the company for less than par, whether an original or a subsequent issue, is bound to respond to the claims of creditors for the difference between the amount so paid and par. This is the view which has prevailed in other jurisdictions.

The "trust fund" theory was ably analyzed and repudiated by the Supreme Court of Minnesota, in *Hospes v. Northwestern Mfg. & Car Co.*¹ Mitchell, J., writing the opinion, said:

"This 'trust fund' doctrine, commonly called the 'American doctrine,' has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules.² . . . There is also much confusion in regard to what the 'trust fund' doctrine applies. Some cases seem to hold that unpaid subscribed capital stock is a trust fund, while other assets are

¹ 48 Minn. 174; 50 N. W. 1117.

² P. 192.

not, — that is, so long as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund.”¹

The New York courts also have entirely repudiated the “trust fund” theory of capital stock.

“Strictly,” says Andrews, J., in *Christensen v. Eno*,² “the capital stock of a corporation is the money contributed by the corporation to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise.

“There are unquestioned public evils growing out of the creation and multiplication of shares of stock in corporations not based upon corporate property. The remedy is with the legislature. But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract.”³

The New York Manufacturing Corporation Act of 1848 made stockholders liable for the debts of the corporation “until the whole amount of capital stock fixed and limited by the Company shall have been paid in and a certificate thereof made and recorded.”⁴

In *National Tube Works v. Gilfillan*,⁵ the court held that all that was required by this statute to make a stockholder liable was that a valid debt should be contracted under the circumstances therein mentioned and before capital stock has been paid in, either in cash or in property honestly regarded as a fair equivalent for cash. In *Rowell v. Janvrin*⁶ attention was called to the provisions of Laws of 1853, c. 333, amending the Act of 1848 by authorizing the trustees of a corporation to purchase mines, etc., and to issue in payment therefor stock to the amount of the value thereof. It was held that with respect to stock so issued “the liability still exists, however, in cases where the stock is issued for property at an excessive fraudulent or fictitious valuation to the knowledge of the trustees and for the purpose of evading the statute. Whether this rule of liability is confined to the trustees who caused the stock to be

¹ P. 194.

⁴ § 10.

² 106 N. Y. 97.

⁵ 124 N. Y. 302.

³ P. 100.

⁶ 151 N. Y. 60.

issued and to such stockholders as are chargeable with knowledge of the fraud, or applies even to innocent holders for value, is a question not entirely free from doubt, but not involved here and need not be decided."¹

The only logical ground for a "trust fund" theory of stockholder's liability on stock issued for property in excess of its fair value is that stated by Mr. Richard C. McMurtrie,² as follows:

"Stockholders who inform the public that the capital of the corporation is so much, and that it has been subscribed for or paid, cannot deprive their creditors of this fund by an arrangement among themselves, agreeing that \$50 shall be a payment of \$100 of the capital represented to have been paid or agreed to be paid."

That is, it must rest upon a contract, express or implied. The uncertainties attendant upon the subject arise largely out of the decisions of courts creating *implied* contracts of uncertain meaning by a strained construction of statutes which authorize the issue of shares of stock in consideration of the acquisition of property.

Some courts which refuse to accept the "trust fund" theory, find a basis on which to hold holders of stock issued for property liable for the debts of the corporation, in what is known as "the true value" rule.

"The *true value rule*," says Judge Seymour D. Thompson,³ "is strictly the rule of the English courts, as we understand their decisions.⁴ When they use the expression 'money's worth' they mean that the property which is turned over to the corporation in payment of its shares must be turned over at a fair valuation, and they mean, further, that whether or not it has been turned over at a fair valuation may become a subject of judicial inquiry in a proceeding to charge a shareholder in favor of creditors on the ground that his shares have not been fully paid for.

"This rule as stated and applied in some of the American courts is, that payment of corporate stock in anything except money will not be regarded as payment except to the extent of the true value of the property received in lieu of money and regardless of the question of fraud."

But, "as value is largely a matter of opinion, anticipation, or belief," to justify a finding of fraud, "there must be actual fraudulent intent, or such reckless conduct as would indicate without explanation an intent to defraud."

¹ See 1 Beach, *Private Corporations*, § 131, c.

² 25 Am. L. Rev. 749.

⁴ See *contra*, Companies Act 1867, § 25.

³ 36 Cent L. J. 92.

Whether the "trust fund" theory or the "true value" rule prevail, the question of the stockholder's liability is still left an open question, to become practical when the enterprise has failed, when property which may have been quite honestly and even conservatively valued has proved after exploitation or use to be actually worth much less than was estimated, and when it may be difficult or impossible to satisfy a court, besieged by clamorous creditors, that the valuation upon which the issue was based was, when made, honest and fair.

As Judge Thompson says, "value is largely a matter of opinion, anticipation, or belief," and in view of the conflicts and uncertainties evidenced by the decisions of courts above cited, the legislatures should enact some clear, definite, and easily ascertainable rule by which the question whether or not shares of stock issued in payment for property are actually full paid and non-assessable should be finally and definitely ascertained, at or near the time of issue — not years later, after the insolvency or bankruptcy of the corporation.

A few of the states have already met the question by legislation declaring that the value agreed upon between the directors and the subscribers shall be final and conclusive.¹ In England,² and in many of the British Colonies in America, this is so where the agreement is embodied in a contract duly filed in a public office.³

Besides the promoters of the enterprise, only two classes of persons have a legitimate interest in the amount and character of the corporate capital, namely: (1) those who purchase the stock or securities of the company, and (2) those who become creditors of the company, actually or impliedly relying upon what is represented to or ascertainable by them concerning its resources. The respective rights and liabilities of both of these classes have been carefully considered and protected by the English Companies Acts (1862 to 1907), and it seems strange that American legislatures have not followed the suggestions furnished by these carefully drawn and well-considered enactments.

In *Hospes v. Northwestern Mfg. & C. Co.*,⁴ Mitchell, J., after finding it impossible to reconcile the decisions of the Supreme Court

¹ Maryland, Public Gen. Laws, Art. 23, § 61; West Va. Code, c. 53, § 24, Laws 1901, c. 35, § 8; Mass. L. 1903, c. 437, § 14.

² The Companies Act 1867, § 25. But see The Companies Act 1900, §§ 33, 7.

³ Masten, Companies Law of Canada, 49; Morrison, Limited Liability Companies in New Zealand, §§ 52-3.

⁴ 48 Minn. 174, 197.

of the United States concerning stock issued by a "going concern," with the trust fund theory, or to predicate in the light of such decisions the liability of the stockholder upon that doctrine, says:

"But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation, and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it is that is the true basis of the liability of the stockholder in such cases."¹

The English Companies Acts proceed on the basis of the theory so clearly stated by Judge Mitchell, but instead of leaving the capital, which is the basis of credit, on the *assumption* that it is an amount of money equal to the nominal capital stock, these statutes require full and detailed statements of the facts to be embodied in prospectuses, where an appeal is made to the public for subscriptions, and to be filed in the office of the Registrar of Corporations.

The underlying principle of these enactments is that full and complete disclosure be made by means of verified statements, and that copies of contracts providing for the acquisition of property to pay for which shares of capital stock are to be issued shall be filed in a public office, such statements and contracts giving full detailed descriptions of all property proposed to be acquired by the company by the issue of its stock or securities, the interest of the promoters, directors, or other stockholders in such property, the cost to the vendors to the company of such property, and all profit or advantage of every kind which directly or indirectly has been or is to be reserved or secured to the organizers. If a public offering of stock or securities is to be made, the prospectus must

¹ P. 197.

conform to the very stringent requirements of the statute, and those who issue the prospectus are held strictly liable, civilly as well as criminally, for any false representation therein or concealment of any material fact therefrom.

As early as 1867 the act amending The Companies Act, 1862, provided¹ that

"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Register of Joint Stock Companies at or before the issue of such shares."²

This section was, however, repealed by The Companies Act, 1900,³ but section 7 of said Act of 1900 requires, in case shares are issued wholly or in part for a consideration other than cash, that a contract in writing specifying the consideration for the issue and "the extent to which they are to be treated as paid up" be filed with the Registrar of Corporations.

In *Matter of Wragg*⁴ it was held that,

"Although a limited company cannot issue shares at a discount, it can, provided the contract is duly registered under the 25th section of the Companies Act, 1867, buy property at any price it thinks fit, and can pay for such property in fully paid-up shares; and the transaction will be valid and binding upon its creditors, if the company has acted in it honestly and not colorably, and has not been so imposed upon by the vendor as to be entitled to be relieved from its bargain."

That is to say, the transaction is conclusive unless the vendor has imposed upon the company to such extent that the company would be entitled in equity to rescind the bargain, surrender what it had received and get back the stock which it had issued in payment. This is virtually the principle on which the United States Circuit Court of Appeals decided the case of *Sternbergh v. Duryea Power Co.*,⁵ above cited.

The French law deals somewhat differently with the subject. It recognizes the right to issue shares of a limited liability company (*Société Anonyme*) to represent property contributed to the corporate undertaking, as well as cash. Each subscriber or associate

¹ § 25.

² Buckley, *The Companies Acts*, 8 ed. (1902), 633-4.

³ § 33.

⁴ [1897] 1 Ch. 796.

⁵ 161 Fed. 540.

is considered as debtor to the company for what he has promised to pay or contribute. The aggregate of the agreed contributions of all the associates constitutes the company's capital.¹

But the Commercial Code provides that the valuations of property forming the basis of shares of capital stock, and any particular advantages secured to any of the shareholders shall not be final and binding until the same shall have been submitted to and approved by two successive general meetings of the shareholders,² no interested stockholder having the right to vote thereon. The law of 1893 also forbids the negotiation of shares issued for property in such manner as to relieve the original taker, until the expiration of two years after the organization of the company. After the expiration of two years, and the approval by two successive general meetings of the shareholders, and upon the payment or delivery to the company of the agreed contribution, whether in money or property, the stock is conclusively held to be full paid and non-assessable. The certificates representing this stock may be either in the name of the owner³ or to bearer; in the latter case transferable by delivery merely.

From the foregoing it is apparent that much confusion of thought as to the capital of a corporation has resulted in conflict in both legislative and judicial dealings with the subject. The real evil is not so much in over-capitalization, or in exaggerated valuation of property constituting a part of the capital stock as it is in the misrepresentation or concealment of material facts in soliciting financial aid for the corporation. If instead of creating by strained construction and forced analogies *ex post facto* contracts between subscribers and the corporation, courts would respect the finality of rules laid down by the legislature, and deal with cases of fraudulent misrepresentation or concealment by the application of well settled principles, and if the laws were modified so as to require full, frank disclosure of all the facts concerning the property serving as a basis for stock issue, and safeguards as to its valuation, and some method by which, after due opportunity had been given for full investigation, such determination should be final, the so-called evils of over-capitalization would largely disappear.

NEW YORK.

George W. Wickersham.

¹ *Traité de Droit Commercial* CH. Lyon-Caen et Renault, Paris 1898, Tome II. pp. 388, 559, 560.

² *Lyon-Caen*, 537, 574.

³ *Code de Commerce*, Arts. 35, 36; *Lyon-Caen*, V. II. p. 445.

LODE LOCATIONS: A SPECIFIC QUESTION OF EXTRALATERAL RIGHTS AND A GENERAL THEORY OF INTRALIMITAL RIGHTS.

II. INTRALIMITAL RIGHTS TO ORE¹ IN LODE LOCATIONS.²

THE term intralimital rights, though very useful, is one that should be used only with great care. This is so because an intralimital right to ore, the right of a lode locator to ore on the dip of a vein within the limits of his location, may be of either one of two natures — it may be a right based on ownership of an apex to which such ore can be referred,³ an apex right, or it may be a right based on ownership of a surface overlying such ore, a common-law right. Since Mr. Lindley first incorporated the term intralimital rights into the phraseology of mining law, however, it has been so loosely used in contradistinction to the term extralateral rights as gradually to lose its exact significance, and to become confounded with and used as a synonym for the narrower term, common-law rights.

It is easy to trace the process whereby this confusion was at, for since extralateral rights cannot be other than apex rights, — that is, rights on the dip of a vein based on ownership of the apex of such vein, — the term used in contradistinction to the term extralateral rights gradually came to be used also in contradistinction to the term apex rights, and so as synonymous with the term common-law rights. As a natural consequence, the term extralateral rights has become confounded with and used as a synonym for the broader term, apex, or dip, rights. So great has become this confusion as to mislead, it is submitted, even a very able court — as will be shown in the hereinafter contained discussion of the Jefferson case.

Lindley⁴ accurately defines the terms intralimital rights and extralateral rights as follows:

¹ Surface rights will not be discussed.

² Continued from 22 HARV. L. REV. 288.

³ Ore, on the dip of a vein, which lies between a given set of dip-right bounding planes, is spoken of throughout this paper as being referable to that part of the apex of the same vein which is included between the same planes.

⁴ All references to Lindley are to Lindley, *Mines*, 2 ed.

"§ 549. *Classification of rights with reference to boundaries.* — Property rights conferred by lode locations may be subdivided for the purpose of convenience into two classes: —

"(1) Those which are confined to things embraced within the boundaries of the location. By the term 'boundaries,' as we here employ it, we include not only the surface lines, but the vertical planes drawn downward through them. If we may be excused for introducing into the mining vocabulary coined and eccentric words, we would classify these rights as *intralimital*;

"(2) Those which, while depending for their existence upon the ownership of things within the boundaries, may be exercised under certain conditions and restrictions out of, and beyond, those boundaries. These rights may be classified as *extralimital*."⁵

It is to be noted that the above statement does not classify the two kinds of property rights conferred by lode locations according to their natures and extents, but merely according to the *loci* of their application. It clearly appears, of course, from the very meanings of the words *intralimital* and *extralateral*, that all rights based on ownership of an overlying surface must necessarily be *intralimital*, and that all *extralateral* rights must necessarily be based on the ownership of some property other than an overlying surface; the reverse propositions, however, are not necessarily true — that is, it does not necessarily follow that all *intralimital* rights must be based on ownership of an overlying surface, or that all rights based on the ownership of some property other than an overlying surface must be *extralateral*. In other words, — for this should be made very clear, — although all rights based on ownership of an overlying surface must necessarily be *intralimital*, and although all *extralateral* rights must necessarily be based on ownership of an apex, it does not logically follow from this that rights based on ownership of an apex may not also be *intralimital* as well as *extralateral*; wherefore it may not be said that apex rights must always be *extralateral* rights or that *intralimital* rights must always be based on ownership of an overlying surface. An *extralateral* right must always be an apex right, and a common-law right must always be an *intralimital* right, but an apex right may be either an *intralimital* right or an *extralateral* right, and an *intralimital* right may be either an apex right or a common-law right.

⁵ *Extralimital* rights are, of course, co-ordinate with *extralateral* rights, for since no right can be exercised across, or beyond, the extended end lines, *extralimital* rights must always be exercised, if at all, only across the lateral, or side, lines. The term *extralateral* right, therefore, is merely a more specific term to import the idea of a right exercised without the limits of a location, across a side line.

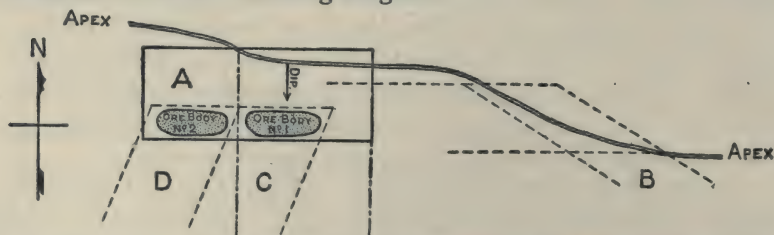
Under our system of mining jurisprudence, of course, a lode locator may base a right to a given body of ore on the dip of a vein on one of two grounds: either that he owns a surface including an apex to which such ore can be referred, or that he owns a surface overlying such ore. That ownership of a properly located apex gives the locator thereof a right, between his dip-right bounding planes, to that part of the dip of the vein which underlies his own surface as well as to that part which underlies the surface of another lode locator, would seem to be clearly indicated by the wording of the statute itself⁶ to the effect that a locator shall have the right to a vein which apexes within his location throughout its "entire" depth, "although" in following the dip of such vein he may pass outside the territory underlying the surface embraced by his boundaries. Indeed it would seem unbelievable that a locator might exercise a right outside of his location which he might not exercise within it—that he might gain a right by crossing his boundaries. On the contrary, it would seem certain that if a right based on ownership of an apex operates to give the locator the vein outside of his location, *a fortiori* such right must operate to give him the vein inside of his location. The surface boundaries of a location, then, play no part in a determination of a question as to whether or not a locator has an apex right to a given body of ore, except in so far as it is to be determined from them how much of the apex lies within the territory of such locator, and except in so far as the dip-right bounding planes are to be established with reference to the direction of the end lines.

Now since the owner of an apex to which a given body of ore can be referred has a right to such ore even though it underlies the surface of another lode locator, it appears that the two kinds of property rights conferred by lode locations are not of equal dignity, that is, that rights to ore are based primarily on ownership of an apex, rights based on ownership of an overlying surface being operative only in the absence of apex rights. An apex right, then, is the right of a lode locator, the end lines of whose location are parallel, to take so much of the dip of a vein as he has of its apex, i. e., the right of a lode locator who has located a surface containing an apex to follow the dip of his vein, from such apex, not only inside but even outside the territory underlying the surface embraced by the boundaries of his location, between planes

⁶ U. S. Rev. Stats., § 2322.

applied at the points where the apex departs from his territory and drawn through or parallel with the non-divergent end lines, and to take all the ore between such dip-right bounding planes which is not also included between the dip-right bounding planes of a senior locator of another part of the same apex — such right being intralimital or extralateral according to the *locus* of its application. A common-law right (so called because, being a right on and under a given surface, based merely on ownership of such surface, it is a right analogous to a right known to common law), then, strictly speaking, is merely the right of a lode locator to use his surface, and to take so much of the ore underlying such surface as neither he himself nor anyone else can have a right to by virtue of ownership of an apex — a right in the nature of an omnibus right to what is left after all apex rights have been exhausted. Finally it is submitted that since one and the same right, namely, a dip right based on ownership of an apex, may be either intralimital or extralateral, according to the *locus* of its application, the two kinds of property rights conferred by lode locations, where enquiry is had as to their natures and extents, should be classified, according to the sources from which they spring, as apex, or dip, rights and common-law rights, and that the terms extralateral and intralimital should be used only to indicate the *loci* of application of such rights, an extralateral right being merely an apex right applied without the limits of a location, and an intralimital right being either a common-law right or an apex right applied within the limits of a location.

Now to illustrate the natures and extents of the rights of a lode locator to ore within the limits of his location, let us state a supposititious case wherein the surface of a given location overlies two bodies of ore, one of which is referable to an apex outcropping within the location, and the other of which is not — as shown by Location A on the following diagram: —



In this case, it is submitted, A's ownership of ore body No. 1 is dependent wholly on his ownership of the apex, and not at all on

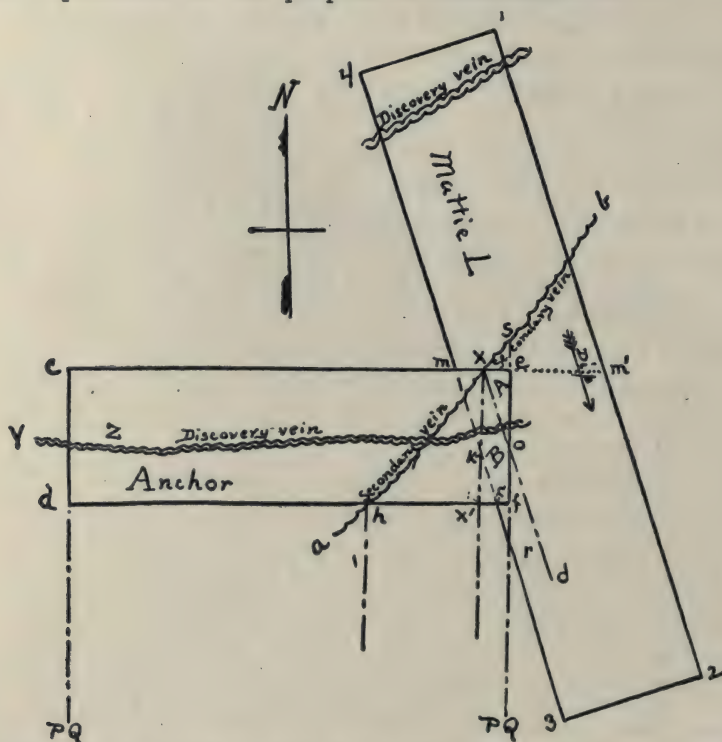
his ownership of the overlying surface, that is, his right to the ore, though it is an intralimital right, is not a common-law right, but an apex right. If, for example, it should develop that the apex right were in another, — as where the ore in question be found also to lie within the dip-right bounding planes of a senior locator of another part of the same apex (see Location B on above diagram), — in such case A's ownership of the overlying surface would profit him not at all; or if, on the other hand, it should develop that the ownership of the overlying surface were in another, — as where such surface also lies within the boundaries of another location whose seniority later becomes established (see Location C on above diagram), — in such case it would seem to be certain that A's right to the ore, so long as he retained the apex, would still survive. On the other hand A's ownership of ore body No. 2, since it is not included between the dip-right bounding planes, is dependent wholly on ownership of the overlying surface. Thus if the seniority of Location D should later become established, A would be deprived of the ore.⁷

In the Jefferson case⁸ whether an intralimital right was a common-law right or an apex right should have been the question

⁷ If the end lines of Location A were widely divergent, no dip-right bounding planes could be established. In such case it might be argued that A could have no apex right to any ore whatever, even within the limits of his location. It is believed, however, that such a contention would be fallacious. Parallelism of end lines, and the consequent establishment of dip-right bounding planes, are necessary to the exercise of extralateral rights, but extralateral rights only. It is true that where dip-right bounding planes have been established they limit the territory in which apex rights may be exercised, not only outside but also inside a location, but it does not necessarily follow that where no dip-right bounding planes can be established, ownership of the ore on the dip of a vein, inside the location, may not be based on ownership of that part of the apex which is included within the same location, in a case where the ore is so situated with respect to the apex that it would have been included between the dip-right bounding planes which would have been established had the end lines been parallel. Lindley, writing of irregularly shaped locations, states (p. 911): "In such cases the right to pursue the vein on its downward course outside . . . may not exist; but in other respects the locator's right to whatever may be found within . . . is the same as in the case of a location of the highest type. It is unquestionably true that neither the form of the surface location nor the position of the vein as to its course controls or restricts the intralimital rights." Whether or not this statement is too broad as applied to the specific question under consideration, at least it may be said that an extralateral apex right differs from an intralimital apex right in this, that the establishment of dip-right bounding planes is necessary to the exercise of the former, but not to the exercise of the latter, notwithstanding that, if established, dip-right bounding planes limit the territory within which the latter, as well as the former, may be exercised.

⁸ *Jefferson M. Co. v. Anchoria, etc., Co.*, 32 Col. 176, 75 Pac. 1070, 64 L. R. A. 925.

with respect to which the respective rights of the parties to the litigation should have been determined. The facts in the Jefferson case are illustrated by a plat contained in Part I of this article,⁹ here reproduced for the purpose of convenience:—



The statement of facts, and of the question which, it is submitted, should have been presented for the consideration of the court, as given in Part I of this article, is here repeated, in part, as follows: "The Anchor was the senior location. The ore bodies in dispute were on the dip of the vein $a-b$, and lay under the surface of the Anchor, within the parallelogram $x-x'-f-e$, less the triangle $k-n-x'$. The decision awarded all the ore bodies in dispute to the owner of the Anchor. . . . The owner of the Anchor could not base a claim to the ore within this territory upon ownership of an apex, for its apex rights were bounded on the east by the plane $x-x'$."¹⁰ Being

⁹ See 22 HARV. L. REV. 266. — A Question concerning the Extralateral Rights Incident to Ownership of a Junior Lode Location which partly Overlaps a Senior Lode Location.

¹⁰ The doctrine of *Walrath v. Champion* (171 U. S. 293), it is true, if applied to this case, would allow rights on the secondary vein conterminous with the rights on the

the owner of the senior location, however, and therefore the owner of all surfaces in conflict with the junior location, it could claim a common-law right to all ore within this territory to which the junior locator had no apex rights. Apparently, then, the whole controversy should have turned . . . upon a determination of a question as to whether or not the junior locator had so located the apex of the vein as to give him rights on the dip thereof within any part of the territory under consideration."

The court, in awarding all the ore within the territory under consideration to the owner of the Anchor, however, based its decision on the ground that such territory, since it underlay a surface of conflict between the two locations, must be considered as embraced by the boundaries of (*i. e.*, as intralimital to) both locations, saying:¹¹ "the Mattie L. does not own the conflicting ground, still this very ground is actually physically within its surface boundaries." The materiality of this consideration, in the estimation of the court, becomes apparent when it is understood that the court classified the two kinds of property rights conferred by lode locations, according to their respective natures, as intralimital rights and extralateral rights, saying,¹² with reference to the statute:¹³ "The property rights conferred by a lode location thereunder are two-fold (1 Lindley on Mines, 2d ed. § 549), intralimital, and extralimital or extralateral."

The argument of the court, briefly stated, was to the effect that the owner of the Mattie L. could base a claim to the ore within the territory in question only on one of two grounds, *viz.*, either that it had intralimital rights thereto, or that it had extralateral rights thereto — that it could have no intralimital rights thereto because the territory in question was also included within the boundaries of a senior location, and that it could have no extralateral rights thereto because such rights are not operative within, but only without, the boundaries of a location; or, in other words, that since the territory did not belong to the owner of the Mattie L., it could have no intralimital rights therein, and since the territory did not lie outside of the boundaries of the Mattie L., it could have no extralateral rights therein.

It is clear that this argument is based upon the assumption that a right exercised inside the limits of a location is necessarily of a

discovery vein — that is, up to the end line *e-f*. That doctrine, however, is here disregarded for the reasons given in Part I of this article.

¹¹ 64 L. R. A. 929.

¹² 64 L. R. A. 930.

¹³ U. S. Rev. Stats., § 2322.

different nature from a right exercised outside the limits of a location; that is, the court, though it recognized that the rights of a lode locator must be based either on ownership of an overlying surface or on ownership of an apex, failed to perceive that the latter class of rights may be applicable elsewhere than outside the limits of a location. Thus, throughout the opinion, the court has used the term intralimital rights to indicate, exclusively, those rights which are based on ownership of an overlying surface, and the term extralateral rights to indicate, comprehensively, those rights which are based on ownership of an apex. In short, misled by the confusing nomenclature of which it made use, the court premised its argument upon the ground that a lode locator can have no right to ore within the limits of his location unless he owns the surface overlying it — the corollary proposition being that a right based on ownership of an apex is not applicable within, but only without, the limits of a location.

This is abundantly proved by even a cursory examination of the opinion. Thus, in the first place, for the purpose of determining the "nature and extent of the rights of the Mattie L. to all the veins found within its surface lines,"¹⁴ the court assumed that "the Anchor was out of the case entirely,"¹⁵ that is, that the Mattie L. was not in conflict with any other location. In discussing this supposititious case (which is the same as the supposititious case hereinabove put, illustrated, and discussed for a similar purpose), it was urged that the rights of the owner of the Mattie L. everywhere within its boundaries, including the territory in question, would be intralimital rights, and from this it was urged that the owner of the Mattie L. could have no rights within the territory embraced by its boundaries unless such territory belonged to it, wherefore it could have no rights within a territory of conflict with a senior location. This argument is palpably founded on the premise that all intralimital rights are based on ownership of an overlying surface. In the second place, in another part of the opinion, referring to the right of the owner of an apex to follow the dip of the vein, the court said:¹⁶ "pursuing the vein, a-b, from its apex, which is within the surface lines of the Mattie L., thence downward on its dip, its owner has encountered a segment thereof inside the side lines, and also the end lines, of the Mattie L., which is also within the surface lines of the senior Anchor location. . . . It will not do to

¹⁴ 64 L. R. A. 930.¹⁵ 64 L. R. A. 929.¹⁶ 64 L. R. A. 929.

say that such segment is outside of the side lines of the *Mattie L.*" This refusal to allow the owner of an apex to follow the dip of his vein into the territory of conflict, on the ground that such territory is not outside the limits of his location and so is not subject to the exercise of "extralateral" rights, is clearly an express holding to the effect that rights based on ownership of an apex are not applicable within the limits of a location.

Thus if it be a correct contention that rights other than those based on the ownership of an overlying surface may be exercised within the limits of a location, then it will not logically follow from the fact that part of such overlying surface is owned by another, that the owner of the location can have no rights therein, and the reasoning of the court in the *Jefferson* case must fail.¹⁷ It is

¹⁷ Another holding of the court was to the effect that even if the territory of conflict might be considered as lying outside the boundaries of the *Mattie L.*, still the owner of that location could have no "extralateral" rights therein, because, in such case, the westerly end line of the location, across which the vein could not be pursued, must be considered to be a crooked course coincident with the intrusive boundaries of the *Anchor*. The court, of course, still proceeded on the assumption that the right of the owner of the *Mattie L.* to follow the dip of the vein, from its apex, into the territory in question, could not be exercised unless said territory be considered as lying without the boundaries of the location. The court, furthermore, seems to have considered the laying of the westerly end line of the *Mattie L.* across the surface of the senior *Anchor* to have been "an unlawful act" (64 L. R. A., p. 930) in disobedience of the statute, an act which could give rise to no extralateral rights — yet the doctrine of the *Del Monte* case (discussed in Part I of this article) is certainly that, under the statute, a junior locator may lay his end lines across a senior surface for the very purpose of securing extralateral rights, and, curiously enough, the court itself, immediately before, had stated that the "law does not require that the bounding lines of a location be laid wholly upon its own territory, . . . but they may be laid along or across other and senior locations. . . ."

The holding of the court was as follows (p. 930 of 64 L. R. A.): "It is not logical to hold that the extralateral rights with respect to this disputed strip are to be defined as though it was territory beyond the *Mattie L.* side lines. . . . But if the *Mattie L.* was permitted to draw in its boundaries so as to include therein only the ground actually belonging to that location, . . . the position of the appellant would not be strengthened. On the contrary, it would be left without the vestige of an extralateral right. For then the westerly legal end line (the located westerly side line) of the *Mattie L.* would be coincident with the northerly side line, the easterly end line, and the southerly side line of the *Anchor* claim for a certain distance, and thus would be not a straight, but a broken, line, and the westerly end line of the location, as thus laid, would not be parallel with its easterly legal end line, and from a claim thus irregularly located extralateral rights are withheld. The law is that it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones. *Walrath v. Champion Min. Co.* 171 U. S. 293."

Now it is submitted that the holding of *Walrath v. Champion*, though correctly stated, is not here correctly applied. That case did not hold that apex rights must be

submitted, therefore, that the enquiry of the court concerning "the nature and extent of the rights of the Mattie L. to all the veins found within its surface lines," should not have been based on a classification of such rights as intralimital and extralateral, but on their classification as apex rights and common-law rights. That is, the enquiry as to the rights of the owner of the Mattie L. to the ore within the territory in question (when the Anchor was considered as "out of the case entirely"), should have been as to whether or not such ore could be referred to an apex within the location, for, if so, then the right to such ore could be lost only by the loss of the apex, and the enquiry as to whether the territory lay within or without the limits of the location could be material only in so far as the territory in question might contain a part of the apex. If such territory did contain a part of the apex, then so much of the ore as could be referred to the part of the apex so contained, would, of course, be lost by loss of the territory, but so much of the ore as could still be referred to an apex outside of such territory would still belong to the owner of the Mattie L.—it being immaterial, so long as the ore lay between the dip-right bounding planes of the Mattie L., whether the apex right thereto were intralimital or extralimital.

Now, as shown on the plat, though the surface of all the territory of conflict belonged to the owner of the Anchor, and so may be spoken of as lost to the owner of the Mattie L., and though this territory included a part of the vein *a-b* (to the west of the point *x*), still some of the ore underlying the surface of this territory, — viz., that underlying the surface of the triangle A, — might still be referred to an apex outside of such territory. That is, the apex of

withheld from a location whose boundaries are crooked courses, but that if a crooked course be crossed by an apex, that segment of the crooked course which is crossed by the apex may be considered as an end line, and apex rights are to be determined with respect to such segment alone. The very point raised in *Walrath v. Champion* was that the owner of the Providence location could have no apex rights because the northerly boundary was a crooked course, and so not parallel with the southerly end line, but the court held that the whole of the crooked course was not to be considered as the northerly end line, but only that segment thereof which was crossed by the apex, and that since such segment was virtually parallel with the southerly end line, apex rights must be granted.

It is to be noted further that under no circumstances, not even if (contrary to the doctrine of the *Del Monte* case) the westerly boundary of the Mattie L. be considered to be the crooked course *q-m-e-f-n-3*, could the line *m-e* be considered an end line, for the vein *a-b* is a secondary vein, and the line *q-m*, which is crossed by the discovery vein, would still be the end-line of the location under the doctrine of *Walrath v. Champion*.

the vein $a-b$, to the east of the point x , indisputably belonged to the owner of the Mattie L, wherefore the plane $x-o-o'$, drawn, parallel with the end lines (the located side lines), from the point where the apex departed on its westerly course from the territory of the Mattie L, defined a dip-right bounding plane to the east of which all ore underlying the surface was referable to an apex included within the territory of the Mattie L. The claim of the owner of the Mattie L to the ore under the surface of the territory indicated on the plat by the triangle A, therefore, should have been based not at all on any claim concerning the surface of such territory, but wholly on ownership of the apex outcropping on its own undisputed surface.¹⁸ Indeed it seems very likely that if such an argument had been insistently presented for the consideration of the court, the owner of the Mattie L would have been awarded the ore underlying the surface of the triangle A, for the court, toward the end of the opinion, expressed itself as follows: "The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, c, f, e, x [$x'-f-e-x$ on our plat], to each belonging such part of the vein as it has the apex of. . . ."

The two kinds of intralimital rights, then, can be clearly distinguished, and so defined in contradistinction to each other. A definition of each separately, however, based on an analysis of the inherent nature of each, is less clear—at least in the case of common-law rights. An apex right, though of a seemingly difficult, because unusual, nature, in fact readily lends itself to analysis. The apparently simple and elementary nature of a common-law right to ore not referable to an apex, on the other hand, is not, it is submitted, capable of logical solution.

The statute¹⁹ reads, in part, as follows:—

"The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of

¹⁸ If, for example, the locator of the Mattie L had extended the north side line of the Anchor, $c-e$, as his own south side line, $m-m'$, in such case there could have been no doubt as to his right under the surface of the triangle A (*Fitzgerald v. Clark*, 17 Mont. 100; Colo., etc., *M. Co. v. Turck*, 54 Fed. 262). It would seem impossible that the locator of the Mattie L, merely by continuing his westerly end line, in its own direction, across the surface of the senior location, thus creating a surface conflict, would thereby have forfeited any dip right which he would have had had there been no surface conflict. It may be that by the establishment of such surface conflict he would have gained no advantage, but certainly under the doctrine of the Del Monte case he might not be penalized therefor.

¹⁹ U. S. Rev. Stats., § 2322.

their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines. . . ."

A patent issued under this statute expressly reserves, out of a fee granted, so much of the ore underlying the surface as may be referable to apices not included by the boundaries, the limitation being expressed substantially as follows: "That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit."²⁰

Thus it is clearly apparent that, under the statute, veins are severed, "throughout their entire depth," from the country rock in which they lie—an apex right being a property right in a vein as distinguished from a property right in the country rock in which it lies and which is subject to ownership under a common-law right.

The nature of apex rights has been analyzed and explained by many writers, and will not be treated of herein otherwise than collaterally to the discussion of the nature of common-law rights—except to point out that an extralateral apex right is not a right created by a statute in derogation of the common law. The government, the grantor of an apex right, is the owner of all territories to which such right may be applied,²¹ and the grant is merely a conveyance of a specified territory which has, expressly or by statutory construction, been excepted from prior grants and which must necessarily be excepted from subsequent grants. It is not, in any sense, a right to enter the territory of another, but a fee simple, vested in the grantee at the time when the grant takes effect,²² to a given parcel of land underlying surfaces owned by others. There is no principle of common law to prevent the

²⁰ Taken from Snyder, *Mines*, § 785.

²¹ "In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their 'public lands.' By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the Government." *Del Monte M. & M. Co. v. Last Chance M. Co.*, 171 U. S. 61.

²² The ultimate fee, of course, is in the government up to the time of issuance of patent.

owner of land from parcelling it as he may see fit; he may convey only a certain part of his territory to another, or he may convey the whole, excepting a certain part, and the part so granted or excepted may be a vertical section running through the land; or a horizontal section underlying the surface; or a slanting section underlying the surface; or a section irregular in width and direction, like a vein, underlying the surface — provided the exact extent of such section be capable of establishment.²³ The statute creating apex rights, then, does not, in derogation of the common law, grant rights in the territories of others, but merely defines the manner in which, in accordance with the principles of common law, the government will parcel certain of its lands.²⁴

The statute clearly grants, to a lode locator, ownership of a surface, and, by necessary implication, ownership of all territory, not specifically excepted, which is incident to ownership of a surface at common law — that is, an inverted pyramid of earth of which the surface of the location is the base and the centre of the earth is the vertex.²⁵ From this territory, however, the statute expressly excepts all ore which lies on the dip of veins which apex outside

²³ "Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface," . . . *Del Monte M. & M. Co. v. Last Chance M. Co.*, 171 U. S. 60.

"Nothing was more common than to sell or demise a piece of land excepting the mines. In like manner, the different strata of the subsoil might be shown to be the subject of different rights. And there might be also in one mine different minerals which were the property of different persons." Lindley, 15.

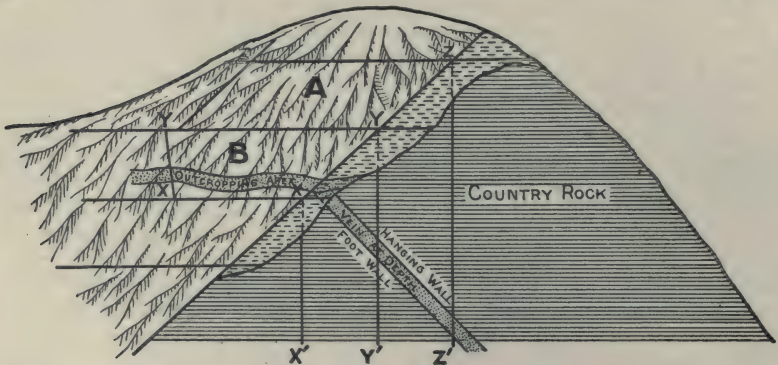
²⁴ This subject is fully, and very clearly, treated in Lindley, § 568, which reads, in part, as follows: "The government being the owner of the fee may carve from it the ownership of the vein. It may grant the surface to one and the vein to another. There was nothing in the common law which prohibited this severance. In fact, it was expressly sanctioned, . . . Instead of being in derogation of the common law, this class of grants is in absolute harmony with it. It is not true, therefore, that the statute should be strictly construed because it contravenes the common law. . . . This dip or extralateral right is not a mere easement. The estate thus granted in the vein is of the same dignity as that of a title in fee. It *is* a title in fee as to the vein granted. . . . This grant of the fee in the vein may be accompanied by certain easements. To illustrate: The right to follow the vein into adjoining lands frequently cannot be exercised without disturbing some portion of the inclosing rock. The grant of the vein necessarily carries with it whatever is reasonably required for its enjoyment and without which the grant would be ineffectual. But the estate in the granted vein is a fee-simple estate."

²⁵ "The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law *rule* is the general law of the States and Territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface." *Del Monte M. & M. Co. v. Last Chance M. Co.*, 171 U. S. 60.

the location.²⁶ No title whatever passes to such ore: it is expressly excepted by the grant. So much is certain.

It is equally certain, however, that, notwithstanding his utter lack of title thereto, the courts have declared, again and again, that a lode locator has a common-law right to ore beneath the surface of his location that is not owned by tunnel locators or by locators of outlying apices of the veins within which such ore lies. Up to this point there is no objection, other than an academic one, to the application of this rule. It is in accordance with the custom of miners. It is simple and practical. It may even be said to supply a deficiency in the statute, for clearly some statutory provision should have been made for the extraction of ore which might have been made referable to an apex, but which was not.

To make this subject very clear let us state a supposititious case upon which to base an argument, all references to ore, in the discussion, being to ore situated similarly to that in the supposititious case. Thus let a case be supposed wherein a given body of ore underlies the surface of a location owned by A, but lies on the dip of a vein which does not apex within A's location, but within a contiguous location owned by B. Let it be supposed, further, that B has located the apex in such manner as not to acquire an extralateral right to this ore. This can be illustrated by a diagram showing part of the surface of a hill-side entirely covered by lode locations, and a vertical section of the hill made by drawing a vertical plane through the aligned end lines of locations A and B.²⁷



²⁶ "It is quite manifest from a reading of the section that no title passes *by virtue of the location* to any part of any vein which has its top, or apex, wholly outside of the boundaries of such location." Lindley, 909.

²⁷ The idea for this diagram is taken from Lindley's Figure 10.

In the above diagram the surface boundaries of the locations are shown; also vertical planes, $x-x'$, $y-y'$, and $z-z'$, drawn through the side lines of locations A and B.

The vein matter, or ore, underlying the surface of location A, since it apexes in location B, was expressly severed from the grant to A. Inasmuch, however, as B's end lines, $x-y$, are widely divergent, B has not complied with that statutory provision under which a locator on the apex may acquire extralateral rights—therefore the ore underlying the surface of location A was not included in the grant to B. Thus it is clear that the title to this ore has never passed out of the government.²⁸ The government itself, however, cannot extract this ore without entering on A's territory, or on the territory of some one of the surrounding locators. Unless, therefore, some method of extracting this ore be devised, the policy of the government to procure the development of its mineral resources will not be fully carried out, and the very purpose of the mining acts will, to that extent, be defeated.

Now if any person be permitted to extract this ore, it is clear that the owner of the overlying surface should be that person. Under these circumstances, then, it has been adjudged that the owner of the overlying surface may take the ore. Thus a rule has now become established which creates a property right in the owner of an overlying surface to all ore within his location to which no apex or tunnel right can be applied, and this right, whatever may be the source whence it is derived, is called a common-law right. It is not in fact, however, a right at common law, it is merely a right by sufferance—a practical, simple, equi-

²⁸ No distinction is to be drawn, of course, between ore which lies on the dip of a vein which does not apex anywhere within the overlying location (as in this diagram) and ore which lies on the dip of a vein which apexes partly within the overlying location but which is not referable to the part of the apex so included (as ore body No. 2 in the diagram on p. 342). The contemplation of the statute is that both end lines of a location shall be crossed by an apex, *i. e.*, that the length of the location and the length of the apex included therein, shall be the same. If, however, the length of the apex as actually located is less than the length of the claim, it is clear that the intralimital rights on the dip of such vein must be bounded by the same planes which bound the extralateral rights. There is no expression contained in the statute which would imply that a locator whose surface lines include some portion of an apex shorter than his claim may drift along the vein to the extent that it lies within his territory. The locator of the outlying part of the apex to which such ore is referable is as much entitled to the ore as if it lay on the dip of a vein which did not apex at all within the overlying location, for the locator of the outlying part of the apex is entitled to a corresponding segment of the vein throughout its entire depth. Such segment, therefore, is excepted from the grant to the owner of the overlying location.

table, and necessary solution of a difficulty not capable of solution by the application of legal principles. No legal solution, therefore, should be attempted, other than a broad justification on the ground that the application of this rule gives effect to the policy of the government.

A common-law right to ore having been recognized, it must at some time be held to become a vested right. It may be said, therefore, that a common-law right to ore becomes a vested right at such time as all parts of the apex to which such ore might have been made referable have been so located as not to make such ore referable thereto. It may even be said, perhaps, that a common-law right to ore has its inception at the time of the making of a location, being at that time an inchoate right subject to defeasance upon condition that an apex be subsequently so located as to make the ore referable to such apex. But however far the at best somewhat doubtful doctrine of common-law rights to ore may be elaborated, sight should never be lost of the basic fact that at the time of the grant the ore was actually, even expressly, severed from the estate granted to the claimant of the so-called common-law right.

The common-law right rule has not been universally recognized by the courts. In *Jones et al. v. Prospect Mt. Tunnel Co.*²⁹ the owners of an overlying surface brought an action sounding in trespass,³⁰ and for an injunction, against a defendant corporation which was engaged in extracting ore from under their surface. The court said: "A patent for a mining claim is quite a different thing from a patent for agricultural land. The latter conveys the surface of the ground, and all that lies beneath it"³¹ [citing cases]. The former does not necessarily do so." Thus the court held that "when evidence is produced tending to show that the ledge apexes outside . . . , this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge; and they must now meet this evidence, and overcome it, or they will fail in establishing their title. . . . If the ownership depends upon whether the ledge apexes inside

²⁹ 21 Nev. 339, 31 Pac. 642.

³⁰ It is curious to note that although, under the statute, the owner of an overlying surface has no possessory right to ore which is not referable to an apex within his location, and although he has no right of possession thereto even under the common-law right rule, at least until after all possible apex rights have been exhausted, yet the form of the action frequently brought by the owner of an overlying surface against one who is extracting the ore under an alleged ownership of an apex to which such ore is referable is trespass or ejectment.

³¹ But see Lindley, § 612.

the exterior lines of the mine, then this fact, the same as any other fact upon which title depends, must be established by the party asserting it. The plaintiffs must recover upon the strength of their own title. If they do not own the ledge from which the ore was extracted, it matters not who does own it." It will be perceived that this holding was in strict logical conformity with the provisions of the statute — it seems to be to the effect that in a case where a given body of ore lies on the dip of a vein which does not apex within the location, the owner of the overlying surface can have no right to extract such ore under any circumstances. This case, then, apparently denies the common-law right rule. Under that rule evidence proving that the ledge apexes outside the overlying location would indeed be sufficient to show lack of statutory title in the owner of such location, but still would not be sufficient to show that the owner of such location might not extract such ore upon proof that no other locator is, or might be, entitled to it. Under that rule the ownership of the ore does not necessarily depend upon whether the ledge apexes inside the overlying location, and so need not be affirmatively established. The owner of the overlying surface does not depend upon the strength of his own title, but upon lack of title in other locators.

It may be urged that the court in this case did not mean to deny the common-law right rule; that it is not clear, notwithstanding the expressions quoted, that the ore would not have been awarded to the plaintiffs if they had been able to prove that neither the tunnel locator nor anyone else had a right to it; that the discussion was had merely as to a point of evidence, namely as to upon which claimant lay the burden of proof of ownership; and that the holding, therefore, is clear only to the effect that, to prove ownership in himself, the owner of an overlying surface must prove lack of ownership in other actual or possible claimants.

An argument so limiting the holding in this case, however, would seem not to be tenable in view of other decisions. Thus, as authority for the holding in the Nevada case, the court cited *Reynolds et al. v. Iron Silver Mining Co.*,³² which is a flat denial of the common-law right rule. In that case the ore in controversy lay, under the surface of a placer location, on the dip of a vein known to exist at the time of application for the placer patent, and not referred to therein — wherefore it was excepted

³² 116 U. S. 687.

from the grant to the plaintiff below. As stated by the appellate court: "There is no assertion by them of prior possession, discovery, or claim to that vein, nor of any other right to it, than that it is found beneath the surface of this placer patent." On the other hand, it was proven in the *nisi prius* court that the ore was not referable to any part of the apex owned by the defendants below, that is, the defendants had no more title to the ore than had the plaintiff. The defendants, however, were in possession, though merely, as stated by the Circuit Court, as "naked intruders." Upon these facts and findings, a verdict was directed for the plaintiff, the court charging: "the defendants show no right or title in the lode at the place in controversy . . . and as to such intruders, the plaintiff's placer title may give a right of possession and recovery." The court, futhermore, refused to give the following instruction asked by the defendants: "The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendants' title." Upon appeal this judgment of the Circuit Court applying the common-law right rule was reversed, the court saying: "The case here must be decided on the correctness of the action of the court in giving that charge, and in refusing to give instructions asked by defendants. . . . If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say until you show *some* title, you have no right to disturb me, it has not been pointed out to us. . . . Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defence against one who has no title at all, and never had any."

Thus it appears that the common-law right rule is not an elementary principle to be taken for granted — that the nature of a common-law right to ore is such that some courts have very logically absolutely declined to recognize it.⁸³

⁸³ Lindley, § 866, quotes from and discusses *Jones v. Prospect Mt. T. Co.*, *supra*, at considerable length. That case, however, has been herein discussed because, it is submitted, Mr. Lindley has treated it not as denying the common-law right rule, but merely in relation to a rule of evidence. Thus he states (pp. 1592-1593): "A, being the owner of the surface, there is a *prima facie* presumption that he owns everything underneath such surface within the vertical planes drawn through the surface boundaries.

In *Reynolds v. Iron Silver M. Co.*, however, Mr. Chief-Justice Waite dissented from the judgment in a short opinion which is now supported by the weight of authority⁸⁴ establishing the common-law right rule. "They are mere intruders," he said of the defendants, "having wrongfully, and without any authority of law, worked from an adjoining claim under the surface of the placer claim of the Mining Company and taken possession of the mineral in the the lode. Under these circumstances it seems to me the Mining Company has the better right. The question is not whether the company owns the lode or vein, nor whether it has the right to take mineral therefrom, but whether as against a mere intruder it has the better right to the possession. . . . In my opinion the charge of the court was right, and the judgment should be affirmed."

So far have the courts gone in the application of this common-law right rule that, by the weight of authority, a presumption of ownership has been established in favor of the owner of an overlying surface as against the owner of an outlying apex. Thus, curiously enough, even in a case where the ore is in fact referable to an apex, the burden of evidence is upon him who actually owns the ore instead of upon him who certainly was not granted either title or possessory right to it. It may be said, as in *Jones v. Prospect Mt. T. Co.*, that the burden of proving title is upon him who asserts title, and never shifts, and that, therefore, if the plaintiff in a possessory action for ore be the owner of an overlying

This was the rule at common law. Therefore, when A introduces proof of title, and if the action be trespass, shows that ore has been extracted from underneath the surface and proves its quantity and value, he is, *prima facie*, entitled to judgment. It then devolves upon B to establish, — (1) The existence of an apex within his boundaries; (2) The identity and continuity of the vein from its top or apex within such boundaries to the point in dispute. So far we think the courts all agree; but as to the degree of proof required of B, and as to whether the burden shifts during the trial from one to the other, there is some difference of opinion." It is submitted that all the cases do not support this statement. It is undoubtedly true that all the courts agree to a presumption of ownership in the overlying locator, but this presumption is based upon another, viz., that all ore underlying his surface is presumed to apex within his location (see *infra*). If it be shown not to do so, then some cases, notably *Reynolds v. Iron S. M. Co.*, *supra*, are clearly to the effect not only that it does not devolve upon B to show an apex right to the ore, but that, even if it be affirmatively shown by A that B has no right, still A may not recover because of lack of right in himself. In other words, certain cases deny the common-law right rule *in toto*.

⁸⁴ A discussion of the cases wherein the common-law right rule has been applied is not within the province of this article. Those cases are cited and discussed in the text books. Herein it is intended merely to analyze the nature of the so-called common-law right to ore.

surface, the burden of proof must be upon him. This, in the limited sense in which the term burden of proof should strictly be used, is true. The burden of evidence, however, immediately shifts to the owner of an outlying apex upon proof, by the plaintiff, of ownership of an overlying surface.

All courts, even those which deny the common-law right rule, are agreed that there is a presumption of ownership in the owner of a surface to all ore underlying such surface. In those cases where there is in fact a common-law right to ore, such right, of course, is based on ownership of an overlying surface, but the rebuttable presumption of law that there is a common-law right in the owner of an overlying surface *in all cases*, is not, it is submitted, based on the fact of ownership of the surface, but on another presumption, — one of fact, — namely, that all ore underlying the surface is presumed to apex within the location.³⁵ Ownership of an overlying surface having been proved, therefore, it devolves upon the claimant under an alleged apex right to prove that the ore does not apex within the overlying location. Further than this all the courts are not agreed. The great majority of cases wherein the common-law right is recognized at all, however, are to the effect that, the ore having been proved not to apex within the overlying location, the burden of evidence does not thereupon shift back to the owner of the overlying surface, it devolving upon him to prove that the ore does not belong to another, but remains with the claimant under an alleged apex right, it being necessary for him affirmatively to prove further that he himself owns the ore, or at least that some one other than the owner of the overlying surface owns it. This rule of evidence, like the common-law right rule itself, seems to be based on practical, rather than theoretical, considerations. That is, the owner of an apex, by following the dip of the vein, may establish his right under the surface of another, if he has any right; but the owner of an overlying surface may not pursue the vein upwards outside of his own territory, and so may not be able to prove that the vein does not apex within the territory of the adverse claimant. The general rule is stated in *Leadville Co. v. Fitzgerald et al.*³⁶ as follows: "within the lines of each location the owner

³⁵ "Doubtless, the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiffs; that is, in the absence of any evidence tending to prove that the ledge apexes outside the exterior lines of the plaintiffs' patented ground, it would be presumed to apex inside those lines." *Jones v. Prospect Mt. T. Co.*, 31 Pac. 644.

³⁶ Fed. Case No. 8158.

shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in another territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one shall show, by a preponderance of testimony, that such deposits belong to another lode, having its top or apex elsewhere."⁸⁷

In conclusion, the pointed and excellent remarks of Mr. Snyder may well be quoted. "Regarding the right of the common law itself," he writes,⁸⁸ "as the same is persistently insisted upon by some courts when there is difficulty in finding any other way to turn, it is not inapt to say that it often becomes the *pous asinorum* of the courts. Whenever a case is found which is difficult of solution by reason of being different from all the adjudged cases, some courts resolutely close their eyes to new paths, sought to be marked upon lines recognizing the controlling thought that congress intended to give to the locator as much of the vein throughout its entire depth as he has of the apex; turn their faces from the other potent factor that congress undoubtedly intended to make and did make a severance of the mineral vein, with its incidental and expressed rights, from the rest of the estate, and have insisted, in the teeth of this last expressed statutory right, that the common law, which had nothing to do with creating the estate in the first instance, this having been granted solely by statute, had, in some mysterious manner, so impressed itself upon the grant, not as given by the patent, but in direct opposition to it, that ownership of the surface creates almost a conclusive presumption of ownership of all beneath. . . . The truer presumption ought to be that if a vein of ore is found beneath the surface of a claim which is conclusively shown to apex outside of such claim, it affords proof equally conclusive, that, whoever else may own it, the owner of the particular surface not containing its apex does not own it, at least until it is shown that, within the rules controlling the right to follow the vein on its dip, no other person can claim it, or that the right is at best doubtful."

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⁸⁷ "That the weight of authority is in favor of Judge Hallett's decision in the Leadville-Fitzgerald case cannot, we think, be denied." Lindley, 1596.

⁸⁸ Snyder, Mines, § 792.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN IMMIGRATION PROCEEDINGS.

THE power of a government to deal with aliens necessarily involves a power to determine whether a given person is an alien. So it may happen that one in fact a citizen may be denied the rights which his citizenship confers and subjected to treatment lawfully appropriate only for aliens.

This possibility is suggested by the recent case of *In the Matter of Hermine Crawford*.¹ It is there held that the power given by Congress to the Commissioner of Immigration, subject to review by the Secretary of Commerce and Labor, to exclude aliens "afflicted with a loathsome or with a dangerous contagious disease," applies to aliens domiciled in the United States returning after a temporary sojourn abroad. This threatens every returning citizen with administrative proceedings in which he must establish the fact not only of his domicile but of his citizenship.

It is therefore important to know how this determination is to be reached. Of the *Crawford* case it has been said: "Under the rule laid down in the Chinese Exclusion Acts a citizen of the United States may be declared by a board of immigration officers to be a non-resident alien afflicted with a dangerous disease and on appeal for a judicial determination of his citizenship the best he can expect is to have his case considered by a higher executive officer whose decision, if adverse to his claim, results in his deportation from the country."²

The authority for this conclusion is *United States v. Ju Toy*.³ That case held in effect that a citizen of Chinese parentage seeking admission at the frontier could be excluded by the administrative authorities, though denied a hearing before a judicial body on the question whether he was in fact a citizen. Though the act of Congress purports to give no authority to exclude citizens, the court holds that it gives power to determine finally whether or not a given person is a citizen. As the court construes the statute, the jurisdiction of the administration, for all practical

¹ 40 N. Y. L. J. 419 (Dist. Ct., N. Y., Oct. 28, 1908).

² 22 HARV. L. REV. 221.

³ 198 U. S. 253.

purposes, is not conditioned upon citizenship, but is broad enough to deal with all persons of Chinese birth seeking to enter the country.

The question of race was not disputed in the case before the court, so the decision does not tell us whether judicial review could be withheld when the petitioner alleges he is not a Chinaman. From one point of view the distinction is of no importance, because a citizen of Chinese parentage is entitled to the same rights as citizens of any other ancestry. But the court, in determining whether it is due process to vest such power in the administration, weighs considerations of public welfare in the balance against the danger of possible infringement of private rights. In balancing these opposing considerations, the number of citizens whose rights may possibly be invaded is of importance. That number is greatly limited when the administration is dealing only with members of races clearly distinguishable from those which furnish the preponderating majority of our citizens. So it is possible to urge that the principle of the *Ju Toy* case would not apply where the administration is given power to deal with all aliens of whatever race; for the exercise of this power would imperil the rights of every citizen in the land who chanced to be returning from abroad. And the possible infringement of private rights to be balanced against the public welfare is increased numerically a thousand-fold.

But even supposing the principle of the *Ju Toy* case should be applied to the exclusion of all aliens affected with certain diseases, it may well be doubted that the decisions of the Supreme Court warrant the assertion that on appeal from the decision of the immigration officers for a judicial determination of citizenship the most that can be expected is a consideration of the question by the higher executive officer.

The *Ju Toy* case came before the Supreme Court upon a certificate from the court below presenting the question whether the court shall treat the finding of fact by the executive officer as final and conclusive "unless it be made affirmatively to appear that such officers in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the same, committed prejudicial errors." So the case involves no question of judicial control over administrative procedure. To say that if the administration uses proper methods in ascertaining a fact, the decision of the Secretary is not reviewable by the courts, is

one thing. To give to the Secretary the final power to pass upon the sufficiency of the procedure, is quite another.

This latter question came before the court in *Chin Yow v. United States*.¹ A Chinese person detained for deportation petitioned for a writ of *habeas corpus*. The District Court dismissed the petition on the ground that it was without jurisdiction in the matter. Appeal was taken to the Supreme Court. Among the allegations of the petition was one that the petitioner was prevented by the officials of the Commissioner from obtaining the testimony of certain named witnesses and that had such opportunity been granted, he could have produced overwhelming evidence that he was born in the United States and therefore a citizen.

The court construes these allegations to mean that the petitioner was arbitrarily denied such a hearing and such an opportunity to prove his right to enter as the statute meant him to have. The constitutionality of the procedure provided by the statute was not involved. The question was whether, when the court finds this statutory procedure is not observed by the administration in reaching its decision, judicial relief can be given, even after the finding of the Commissioner has been approved by the Secretary of Commerce and Labor—a decision which the statute declares shall be final. If the statute intended the decision of the Secretary to be final with respect not only to the fact decided but also to the legality of the methods employed in reaching the determination, the question of constitutionality would be raised. But the court is of opinion that the statutory provision that the decision of the department shall be final presupposes that the decision was reached after a hearing in good faith. Though the mode provided by the statute is exclusive, the courts are not forbidden to interfere where the statutory methods are disregarded. In other words, the statute does not vest in the administration power to determine whether its conduct of the case conforms to the law.

It is therefore held to be clear that this question is one for the courts. The opinion, however, is careful to state that the only ground for taking jurisdiction is the denial of a fair opportunity to be heard. The court may grant the writ to look into the question, but if it find the hearing fair, it can proceed no further and the petitioner must be remanded.

The Supreme Court lays down no rule as to what faults or omis-

¹ 208 U. S. 8.

sions will render a hearing unfair. It declares, however, that the unfairness and therefore the jurisdiction of the court would not be established merely by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true even though no contrary or impeaching testimony was adduced. Nor could a denial of a satisfactory hearing be established by proving that the decision was wrong. For this would secure that judicial review expressly denied to Ju Toy.

The Supreme Court in the Chin Yow case reversed the decision of the District Court and ordered the writ of *habeas corpus* to issue. What decree should the District Court make in case it finds a fair hearing was denied? Such denial by no means involves the conclusion that the petitioner is entitled to enter. He is not therefore entitled to his discharge. The logical disposition of the case would remand him to the Commissioner for a re-hearing, with directions to the Commissioner how to proceed. Mr. Justice Holmes considers such contingency and concludes: "The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force."

It would therefore seem that if the District judge holds the hearing before the Commissioner unfair, he may take matters into his own hands and consider the evidence on the merits. If it seems to him to establish the fact of citizenship, he may discharge the petitioner, free from the power of the Secretary of Commerce and Labor to make any decision in the matter, final or otherwise. But this is a fact on which the statute meant the court to have no say. That statute has been sustained as constitutional.

So the Supreme Court seems to be limiting its decision in the Ju Toy case to this extent: if the court finds the administration acted fairly, its decision will not be questioned; if unfairly, the court will assume jurisdiction of the whole case and determine finally whether the petitioner is a citizen and entitled to enter.

The District judge is thus afforded opportunity for indulging in some intricate mental processes. The evidence produced to show the hearing was unfair may convince him the decision of the Commissioner was erroneous. But he is not to think about this until he first decides that the hearing was unfair. And he is not to deem the hearing unfair because the decision is erroneous, nor merely because the "Commissioner did not accept certain sworn state-

ments as true, even though no contrary or impeaching evidence was adduced." From this it would seem the hearing might not be unfair when all the evidence in the case tended to prove citizenship, but the Commissioner chose to disbelieve it. The crucial fact in determining whether the hearing was unfair must doubtless be the denial of opportunity to present evidence. But it is hardly possible for a judge, who is convinced that one in fact a citizen is to be denied admittance, to eliminate this and other considerations from his mind in judging the fairness of the hearing. So that the petitioner who questions the administrative procedure is not so entirely dependent upon the judgment of the administration on the merits of the case as the Ju Toy decision would lead us to suppose.

To reconcile the dictum in the Chin Yow case with the Ju Toy decision, we must state the law as follows. If the District Court order the discharge of the petitioner solely because it deems the decision of the administration erroneous, the Supreme Court will on appeal reverse its action. But if the District Court discharge the petitioner because it first finds that the administration denied him a fair hearing and then that its decision was erroneous, this decree the Supreme Court will not disturb.

But the question may come before the Supreme Court in such a way that it will be compelled to choose between the Ju Toy decision and the suggestion in the Chin Yow case. The District judge may not follow the hint of the Supreme Court. He may find the hearing unfair, refuse to examine the case on its merits, and order the Commissioner to proceed anew. If appeal from this decree is taken to the Supreme Court, shall that court sustain the decree or order the District Court to examine the case on its merits? Or suppose the decree of the District Court is not appealed from. After the rehearing before the Commissioner, the writ of *habeas corpus* is again sought from the District Court. The District Court issues the writ, decides that the rehearing was fair and refuses to examine the case on its merits. We then have the precise state of facts in which the court says the petitioner must be remanded. When the question of the legality of the procedure is entirely eliminated, the Supreme Court cannot force the District Court to examine the case on its merits without overruling squarely its decision in the Ju Toy case. Unless we are to assume that such is the intention of the Supreme Court, we must regard the suggestion that the most convenient thing to be done when the hearing is adjudged unfair is to try the case on its merits as a

piece of advice to the District Court which it may follow or not as it pleases. But it seems unusual for the Supreme Court to leave so important a question to the whim of an inferior tribunal.

The question seems never to have been squarely raised whether the procedure provided by statute, if duly followed, is due process. One of the grounds of Mr. Justice Brewer's dissent in the *Ju Toy* case was that the administrative action was inconsistent with the requirements of due process because of the severity of its procedure. But the court decides the case on the assumption that no abuse of authority of any kind is involved. But in the *Sing Tuck* case¹ where the court held that at any rate the immigrant could not get before the courts until after he had pursued the remedies offered him by the statute the opinion in referring to the procedure stated that in case of appeal from the inspector to the Secretary, new evidence, briefs, etc., could be submitted, and that the whole scheme was intended to give as fair a chance to enter the country as the necessarily summary character of the proceedings would admit.

From this review of the decisions, we may attempt to state the judicial relief open to one who claims to be a citizen and who is prevented by administrative authorities from entering the country on the ground that he is an alien within the prohibited classes. Where he has no fault to find with the methods pursued by the administration in reaching its determination that he is not in fact a citizen, he cannot question that determination before the courts. If he can establish to the satisfaction of the court that the procedure employed by the administration was not according to law, he is at least entitled to a rehearing before the administrative authority. Probably, the court which decides that the administrative hearing was unfair may if it chooses dispose of the case on its merits. Possibly, after an administrative hearing has been adjudged unfair, the petitioner may compel the court to hear and determine the whole case. It may be that the Supreme Court means to lay down the rule that if the administration does not play fair the first time, the whole case will be taken out of its hands. But the power of the administration is not thus expressly limited by the terms of the statute. It is difficult to see how the court can enforce compliance with such a rule, consistently with its earlier decisions.

¹ *United States v. Sing Tuck*, 194 U. S. 161.

Finally, it is to be remembered that if the question of alienage depends upon a matter of law, the question is always one for the court, and judicial relief will be granted even before recourse is had to the administrative remedies offered.¹

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¹ *Gonzales v. Williams*, 192 U. S. 1.

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THE RIGHT OF WITHDRAWAL FROM A PUBLIC ENTERPRISE. — The law of public callings has not very definitely determined the extent of liability undertaken by the grantee of a public franchise. Where the franchise is permissive in its terms the grantee is not held bound to make use of the privileges granted;¹ and in the absence of a covenant or of the acceptance of the franchise upon the condition of an exercise thereof, the only remedy against the grantee would seem to be *quo warranto* and forfeiture of the franchise for non-user.² Once having begun an exercise of the franchise, however, the grantee's duty to duly regard the public interest is recognized and enforced by the state.³

But does this duty involve an obligation to continue the exercise of the franchise, or may the grantee abandon its use? Where an integral part of the public service has been discontinued, while the operation of the whole might be conducted at a profit, mandamus is usually allowed to secure a continuance;⁴ but authority on this point is divided in the case of carriers, where an entire section of the road is discontinued because its operation involves financial loss.⁵ In such cases an attempt is made to abandon the franchise in part. But the law clearly regards the franchise as an entirety, so that an order to operate the whole road would seem a proper regulation of the use of the franchise; for the inconsistency of retaining a franchise and refusing

¹ York & North Midland Ry. Co. v. Queen, 1 El. & Bl. 858.

² See People v. The Albany & Vt. R. R. Co., 24 N. Y. 261; State ex rel. Knight v. Helena Power & Light Co., 22 Mont. 391.

³ Atlantic Coast Line v. N. Car. Corp. Com'n, 206 U. S. 1.

⁴ Union Pac. R. R. Co. v. Hall, 91 U. S. 343; People v. St. L., A., & T. H. R. R. Co., 176 Ill. 512; State v. Hartford & N. H. R. R., 29 Conn. 538.

⁵ San Antonio St. Ry. Co. v. State, 90 Tex. 520; State ex rel. Grinsfelder v. Street Ry. Co., 19 Wash. 518.

to regard the public interest as a whole is apparent.⁶ Indeed, state regulation would be rendered ineffective if particular unprofitable parts of the enterprise could be discontinued at will.⁷

Where, however, the operation of the entire road has been abandoned by an insolvent carrier, mandamus is refused.⁸ These cases have been rested either on the restriction upon state regulation imposed by the Fourteenth Amendment,⁹ or on the theory that the financial failure of the enterprise indicates a lack of public demand for its continuance.⁹ It is, however, suggested in the general law on this subject that an arbitrary abandonment of the franchise might be denied.¹⁰ If the grantee is an agent of the state in conducting the public enterprise, as the relation is sometimes conceived, or is a trustee for the state of the property and interests acquired by exercise of the franchise, the obligation to continue operations would seem clear; for this agency would involve a contractual obligation. Just here, however, is a difficulty; for though a contract between the state and the grantee is admittedly conceivable, yet in the usual grant of a permissive franchise the elements of contract are entirely lacking. Indeed, if the relation between state and grantee was based on contract, obviously the Fourteenth Amendment would not apply. Again, the grantee is not properly a trustee with the duty to continue the trust until relieved from office; for the state is interested in no wise in the ownership, but only in the use, of the property. Then, if the Fourteenth Amendment protects the property of the grantee, it would seem that its provisions should equally protect his liberty; and that a duty imposed by the state to continue a use of the franchise would violate this fundamental right. But aside from the constitutional protection thus afforded, it is submitted that a public franchise merely grants permission to exploit an enterprise in which the state is necessarily interested; that the power of the state is limited to regulation of the actual exercise thereof; that this enterprise voluntarily engaged in may be discontinued at will; and that the service of the public, upon which the exercise of the franchise is based, involves only the duty not to discontinue until after reasonable notice is given.¹¹ In a recent case mandamus was allowed ordering a municipal corporation to continue the exercise of a ferry franchise. In the *Matter of Wheeler*, 40 N. Y. L. J. 1117 (N. Y., Sup. Ct., Dec. 1908). It is clear that the legislature may direct the conduct of a municipality and impose pecuniary burdens.¹² And support for this case must be found in a legislative direction for such continuance contained in the franchise granted.¹³

THE VIRGINIA RATE CASES. — For many years an approved method of attacking unconstitutional state legislation has been to ask a federal court to enjoin state officers from enforcing it. Given the ordinary grounds for equitable and federal jurisdiction, the injunction issued,¹ despite the

⁶ Savannah Canal Co. v. Shuman, 91 Ga. 400; People *ex rel.* Town of Schaghticoke v. Troy & Boston R. R. Co., 37 How. Prac. (N. Y.) 427.

⁷ See 21 HARV. L. REV. 49.

⁸ Ohio & M. Ry. Co. v. People, 120 Ill. 200; Jack v. Williams, 113 Fed. 823.

⁹ See Commonwealth v. Fitchburg R. R. Co., 12 Gray (Mass.) 180.

¹⁰ See note, 24 L. R. A. 564; Akron v. East Ohio Gas Co., 53 Oh. L. Bull. 218 (Oh. C. P., Nov. 1908).

¹¹ Indianapolis Gas Co.'s Case, 35 Chic. Leg. News 165 (Dec. 30, 1902).

¹² Prince v. Crocker, 166 Mass. 347.

¹³ See Mayor, etc., of N. Y. v. Starin, 106 N. Y. 1, 15, 16.

¹ Smyth v. Ames, 169 U. S. 466.

Eleventh Amendment.² The remedy was peculiarly applicable to railroad rate regulation, since the complaining company could usually show the likelihood of irreparable damage or multiplicity of actions under the statute or rate alleged to be invalid. The legislatures accordingly provided regular methods of access to the state courts, for the purpose of reviewing the acts of the rate-making body;³ but it was held that the state could not limit the railroads to relief in the state courts, either negatively by furnishing an adequate remedy at law,¹ or by positive prohibition of recourse to the federal courts.⁴ Such being the situation, the Supreme Court has recently announced that a carrier complaining of a rate fixed by a state commission must first exhaust the remedies in the state courts provided by the statute before it applies to the federal court for an injunction. *Prentiss v. Atlantic Coast Line Company*, U. S. Sup. Ct., Nov. 30, 1908. No precedents are cited for this sudden modification of an established procedure, nor have any been found; nevertheless similar sets of facts have occurred before.⁵ It is true that here the state provided an appeal from the commission to a state court which was given power, upon reversing the order appealed from, to substitute an order of its own;⁶ whereas in previous cases the complainant's remedy, whether by independent action in a court of first instance or by appeal, was considered a means of judicial, not legislative, review.⁷ Hence there is much force in the majority's argument that the federal judge should wait, before restraining the enforcement of legislation, for the state completely to legislate. This reasoning narrows the decision to the particular facts, which are not likely to occur in other states.⁸

A broader ground, suggested by the majority opinion, is that of comity between the two systems of government. The plaintiff who applies for an injunction against invalid state legislation is not compelled,¹ as is generally the prisoner who applies to a federal judge for a writ of *habeas corpus* alleging detention by the state in violation of the Constitution,⁸ to reach the Supreme Court only by writ of error from the appellate state tribunal. Perhaps the present decision establishes a course midway between the former liberal attitude toward injunction bills and the stricter rule in *habeas corpus* proceedings. The policy is to adopt those methods which are most apt to produce harmony between the federal judiciary and the states.⁹

THE APPOINTMENT OF A RECEIVER FOR A CORPORATION DE FACTO. — A recent case suggests the question whether it is proper for a court to appoint a receiver in the case of a *de facto* corporation. *Matter of New York, W. & B. Ry. Co.*, 193 N. Y. 73. The question was not squarely raised in the case, because the defect in incorporation was later cured *ab initio* under statutory provision. There is little authority directly on the point, but it

² See 21 HARV. L. REV. 527.

³ See Beale and Wyman, Railroad Rate Regulation, c. XLI.

⁴ *Ex parte Young*, 209 U. S. 123.

⁵ *Smyth v. Ames*, *supra*. Cf. *Reagan v. Farmer's Loan and Trust Co.*, 154 U. S. 362, where the provision for review was construed to include access to the federal court.

⁶ Va. Const., Art. XII, § 156 (g).

⁷ *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353. Cf. *Western Union Tel. Co. v. Myatt*, 98 Fed. 335.

⁸ See 21 HARV. L. REV. 204.

⁹ See *Taylor v. Carryl*, 20 How. (U. S.) 583.

has been held that a receiver may be appointed for such a corporation,¹ and a recent writer assumes that the winding up of a *de facto* corporation is similar to that of a *de jure* corporation.² And it seems settled that, after the court has appointed a receiver for a corporation, third parties are estopped from attacking the incorporation against him to the same extent as against the associates.³ Analogously, the state may recognize the incorporation in spite of a defect, so that the associates cannot avail themselves of the defect to resist taxation as a corporation.⁴ And a receiver may be appointed to settle the affairs of a defunct corporation,⁵ or of a corporation whose charter has been forfeited.⁶ On the other hand, the appointment of a receiver for a corporation — which is generally governed by statute⁷ — usually rests in the sound discretion of the court,⁸ and courts are inclined to construe strictly statutes giving them such power.⁹

It has been said that courts of equity have inherent power to appoint a receiver for a corporation even in the absence of statute.¹⁰ At all events, they are generally expressly given such power to-day by statutes.¹¹ Then, since a court of equity can appoint a receiver for a partnership¹² or corporation, as well as for a natural person,¹³ it seems to follow that it can appoint a receiver for a corporation *de facto*. But the question is whether the receiver should be appointed on the corporate basis and under statutes applying only to corporations. This is important, because, in the absence of express statutory provision, a court will not appoint a receiver for a corporation except on grounds which would justify the appointment in the case of a natural person.¹⁴ However, if it has once been decided that the associates are liable merely as stockholders,¹⁵ and not as partners, it seems to follow as a logical matter of procedure that a receiver may be appointed to wind up the affairs of a corporation *de facto* on the corporate basis. But, granting this much, it is still to be observed that a corporation is not necessarily dissolved by the appointment of a receiver,¹⁶ and that a receiver may even be appointed to carry on the business for a limited time under the direction of the court.¹⁷ And it is submitted that different considerations arise when the receiver is appointed not merely to wind up the affairs of a corporation *de facto* but to carry on its business. For a court to conduct the business on the corporate basis, when a condition imposed by the legislature as precedent to incorporation has not been complied with, would be directly, and not merely collaterally, in the teeth of the statute. It seems that the farthest a court should go in such a case would be to order the receiver to cure the defect in incorporation, if a statute made that possible, and conduct the business on the corporate basis only after that.

¹ Dobson v. Simonton, 78 N. C. 63.

² Machen, Corporations, 251.

³ Estate of Davis v. Watkins, 56 Neb. 288.

⁴ Comm. v. Licking Valley Bldg. Ass'n, 118 Ky. 791.

⁵ State ex rel. Brittin v. New Orleans, 106 La. 469.

⁶ American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526.

⁷ Vila v. Grand Isl. Electric, etc., Co., 68 Neb. 222.

⁸ Chicago, etc., Co. v. U. S. Petroleum Co., 57 Pa. 83.

⁹ Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429.

¹⁰ See Davis v. Gray, 16 Wall. (U. S.) 220, per Swayne, J.

¹¹ U. S. Trust Co. v. N. Y., etc., Ry. Co., 101 N. Y. 474.

¹² Gowan v. Jeffries, 2 Ashm. (Pa.) 296.

¹³ Corcoran v. Doll, 35 Cal. 476.

¹⁴ Barber v. International Co. of Mexico, 73 Conn. 587.

¹⁵ See 21 HARV. L. REV. 305.

¹⁶ Allen v. Olympia Light & Power Co., 13 Wash. 307.

¹⁷ O. & M. Ry. Co. v. Russell, 115 Ill. 52.

JURISDICTION OF EQUITY TO AVOID A MULTIPLICITY OF SUITS WHEN ONE IS ARRAYED AGAINST ONE.—The theory underlying a bill of peace is that it avoids a multiplicity of suits at law and thus either gives the plaintiff a more adequate remedy, or saves the time of the courts. A pure bill of peace presumes that the plaintiff would otherwise have only a legal right. If a plaintiff has a right in equity on any other grounds, his remedy is not, properly speaking, that of a bill of peace, but rather a uniting of equitable suits. Thus, if a plaintiff seeks an injunction to restrain a defendant from committing waste,¹ or to prevent irreparable damage,² or on account of the inadequacy of relief at law because of the defendant's insolvency,³ equity assumes jurisdiction under other appropriate heads.

Bills of peace may be classified under two general heads: first, where one, either as plaintiff or defendant, is arrayed against many;⁴ second, where one is arrayed against one. An interesting case of the latter type recently came before the Supreme Court of Illinois in which the plaintiff brought a bill to restrain the defendant from continually trespassing upon his land. The defendant did not dispute the plaintiff's title, but demurred on the ground that the plaintiff had an adequate remedy at law. The court overruled the demurrer and granted an injunction to prevent a multiplicity of suits. *Cragg v. Levinson*, 37 Nat. Corp. Rep. 614 (Dec. 15, 1908).

Bills of peace of this class were at first reluctantly granted to relieve a plaintiff in possession of realty who had established his right at law from the burden of continual suits of ejectment. Lord Cowper, in a celebrated case where title to land had been five times tried at law and five uniform verdicts given for the plaintiffs, refused to grant relief, but his decision was overruled by the House of Lords.⁵ The equity of the plaintiff arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise between fictitious parties, a recovery in one action constituted no defense to another similar action or to any number of them, a change of date in the alleged demise being sufficient to support a new action. To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: he must have been in possession; he must have been disturbed in his possession by repeated actions at law; and he must have established his rights by successive judgments in his favor.⁶ Today no fixed number of successful verdicts is required, and if the plaintiff has established his title by one successful suit at law,⁷ or if a previous decree in equity has established the rights of the parties in a case properly within the jurisdiction of equity,⁸ it will be considered sufficient to maintain the bill. Nor is a verdict always essential; for it has been held that the vexatious institution and abandonment of repeated actions warrant a bill to restrain the continuance of such conduct.⁹ Moreover, if the defendant admits title in the plaintiff and is committing repeated trespasses it is submitted that the Illinois decision is correct on principle, and it is supported by the weight of author-

¹ *Kerlin v. West*, 4 N. J. Eq. 449.

² *Tribune Association v. The Sun*, 7 Hun 175.

³ *Kerlin v. West*, *supra*.

⁴ For a discussion of the principles involved in this type, see 21 HARV. L. REV. 208.

⁵ *Lord Bath v. Sherwin*, 4 Brown, Cases in Parliament, Tomlin's ed. 373.

⁶ *Holland v. Challen*, 110 U. S. 15; *Craft v. Lathrop*, 2 Wall. Jr. (U. S.) 103; *Leighton v. Leighton*, 1 P. Wms. 670.

⁷ *Paterson Co. v. Jersey City*, 9 N. J. Eq. 434.

⁸ *Pratt v. Kendig*, 128 Ill. 293, 298.

⁹ *Thompson's Appeal*, 107 Pa. 559. See Ames, Cas. Eq. Jurisd., Parts I, II, III, 97.

ity.¹⁰ There being no dispute as to the title, the objection to equity's taking immediate jurisdiction is removed. Indeed, even where title to land was in dispute equity might conceivably have decided the rights of the parties without a previous trial at law; but equity from early times has consistently refused to do so, preferring to leave the parties to prove their titles before a jury.

EXTRA-TERRITORIAL EFFECT OF ADOPTION. — Adoption is the creation of the relationship of parent and child between strangers in blood.¹ It is not a common-law right, but comes from the civil law, and has gradually been introduced into the statutes of several states in this country. Following the usual law as to statuses, jurisdiction to create it depends on domicil. A valid decree of adoption can be given by the courts of the state where both parties are domiciled, but not by a state where neither is domiciled, and in this respect it differs from the creation of the marital status. If the parties have separate domicils, that of the child probably has jurisdiction, at least, if the adopting parent does the necessary acts therein,² although the argument that, as in divorce, a state in which either party is domiciled can give a valid decree fails to distinguish between the creation of a status and its destruction.³

Granting that a valid adoption has been consummated, what is its effect on the succession to property in another state? It has been said that where by the law of the domicil a person is the "heir" and "child" of another, the state with jurisdiction to determine the status having so declared, the former's standing as heir must everywhere be recognized, and that, if the latter dies intestate leaving property in another state, by whose law it goes to the heir, the former is entitled.⁴ This assumes that status alone decides succession, overlooking that succession involves also a matter of description.⁵ The descent of realty is governed by the *lex rei sitæ*.⁶ England does not say that English land shall succeed to whomever is declared heir by foreign law, but that it shall go to the eldest son born in lawful wedlock. A foreigner's natural son, legitimated through subsequent marriage by the law of his domicil, is not, therefore, the heir of English land.⁷ Similarly, a foreigner's adopted son is not the heir of land in a state which knows nothing of adoption, not because he is not heir in the state of domicil, but for the reason that he does not fulfill the description of the person to whom the *lex rei sitæ* says land shall descend.

In order, therefore, to determine the rights of a foreigner's adopted child, it is essential to ascertain whether adopted children are heirs in the state of the situs.⁸ If statutes of adoption in that state say nothing about inheritance, it may be argued that the status is to be interpreted in the light of

¹⁰ *Blondell v. Consolidated Gas Co.*, 89 Md. 732; *Boston & Maine R. R. v. Sullivan*, 177 Mass. 230; *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391; *Goodson v. Richardson*, 9 Ch. App. 221.

¹ Thus differing from legitimation which presupposes a natural relation. 3 Beale, *Cas. Conf. L.*, 526.

² *Van Matre v. Sankey*, 148 Ill. 536. *Contra*, *Foster v. Waterman*, 124 Mass. 592.

³ See 20 HARV. L. REV. 400. *Contra*, *Miner, Conf. L.*, § 101.

⁴ *Lord Brougham, in Birtwhistle v. Vardill*, 2 Cl. & F. 571, 582, 584.

⁵ *Story, Conf. L.*, 8 ed., 142 (a).

⁶ *Van Matre v. Sankey*, *supra*.

⁷ *Birtwhistle v. Vardill*, 7 Cl. & F. 895.

Roman law, where it originated; and by which an adopted child seems to have gained the inheritable capacity of a blood relation.⁸ But the better view appears to be that, as adoption is distinctly in derogation of the common law, and the common-law rights of other relatives, the statutes must be strictly construed and the child given inheritable capacity only when there is an express direction to that effect.⁹ A foreigner's adopted child must also be denied capacity if, while recognizing the right of inheritance of adopted children, the statutes apply, or are construed to apply, only to adoption proceedings provided by that state. In a recent case succession to land was denied in the state of the situs, where the statute required acknowledgment and registration in the probate court as the act of adoption.¹⁰ *Brown v. Finley*, 47 So. 577 (Ala.). As the law of the domicile and of the situs concurred in allowing adopted children to inherit, the result seems only to be justified on a needlessly narrow construction of the statute.¹¹

RECEIVERS' CERTIFICATES.—Since the decision in the leading case of *Meyer v. Johnston*,¹ it is undoubted law that, when it is necessary for the preservation of the property, railroad receivers have power to issue, with the consent of a court of chancery, receivers' certificates to become a first lien on the property even against the will of the mortgagees whose priority is thus divested. This practice may be defended on the theory that the court, having obtained control of the *res*, must for the protection of all parties interested see that it does not diminish in value.² The courts, however, have not limited the issue of certificates to that actually needed for the preservation of the property, but have extended the doctrine of *Meyer v. Johnston* until receivers have been given power to issue certificates for almost any purpose. As the authorities now stand, certificates are issued under the pretense of preservation to complete work already begun,³ to buy new rolling stock,⁴ and indeed some cases have gone so far as to allow certificates to be issued to pay off wages accrued before the receiver was appointed, at the cost of preferring unsecured to secured creditors.⁵ Those courts which have gone to this extent, groping for a satisfactory reason upon which to base their decisions, have drawn an unwarranted analogy to the doctrine of salvage in admiralty law.

This practice should certainly not be extended, for the power of a court of chancery to divest the lien of prior encumbrancers without their consent is difficult to defend upon any sound principle of legal reasoning. The undertaking of new enterprises should at any rate be no justification. It is certain that a railroad upon finding itself in distress could not prefer those coming

⁸ Markover v. Krauss, 132 Ind. 294. See Hunter, Rom. Law, 3 ed., 203-4.

⁹ Keegan v. Geraghty, 101 Ill. 26. It is on this principle that where the right to inherit from the parent is given, the child cannot inherit from other relatives of the parent unless the statutes so provide. Cf. N. Y. Life Ins., etc., Co. v. Viele, 161 N. Y. 11.

¹⁰ Ala. Civ. Code, 1907, § 5202.

¹¹ Ross v. Ross, 129 Mass. 243; Gray v. Holmes, 57 Kan. 217.

¹ 53 Ala. 237.

² Wallace v. Loomis, 97 U. S. 146.

³ Bank of Montreal v. R. R. Co., 48 Ia. 518.

⁴ Miltenberger v. Logansport R. R. Co., 106 U. S. 286.

⁵ Union Trust Co. v. Illinois Midland R. R. Co., 117 U. S. 434; Miltenberger v. Logansport R. R. Co., *supra*.

to its assistance to its former secured creditors without the latter's consent ; for such an act would clearly impair the obligation of its contracts. And since the Constitution of the United States forbids a state to pass an act which would have such an effect, it is difficult to see how a court — which is only one branch of the government of a state — can have a power denied to the state itself. The practice has been defended on the ground that railroads are public in their nature and that the public would suffer great inconvenience and loss if these improvements were not undertaken.⁶ But in reply it may be said — and the argument seems unanswerable — that the security of a debt is itself property, and the divesting of its priority for the benefit of the public is the taking of property for a public use for which the public should render compensation.⁷

It has been the almost universal rule of equity to distinguish between quasi-public and private corporations, and in the latter to allow the issue of certificates only for the purpose of maintaining and preserving the property. It is as indefensible in theory to divest vested rights without the lienholders' consent in public service corporations as in private corporations ; and although on the authorities it is well settled that receivers of public service corporations have power to issue certificates for purposes other than the physical preservation of the property, a limitation on that power in private corporations should be looked on with approval. In a recent case, however, the New Jersey Chancery Court has extended this power to a point far beyond any that has yet been reached. *Lockport Felt Co. v. United Box Board and Paper Co.*, 70 Atl. 980. A receiver of an insolvent private corporation composed of eighteen mills obtained permission of the court to issue certificates to provide a fund for the paying of an installment of the bonded indebtedness of one of the mills which was subject to immediate foreclosure in case of default ; such certificates to become a lien on all of the other mills prior to that of the subsisting mortgage. The court granted this authority on the ground that such a course was necessary for the preservation of the property. It is difficult to follow the reasoning which underlies such an extension of the general doctrine. "Preservation of property," as interpreted by the courts, has never meant preservation from the claims of a mortgagee, but preservation from physical destruction.⁸

DEPENDENT RELATIVE REVOCATION OF WILLS. — The doctrine of dependent relative revocation of wills is undoubtedly closely associated with the notion of a conditional revocation. It is difficult, however, to define its exact scope or to deduce from the authorities any satisfactory general principles by which the various classes of cases which have applied the doctrine may be reconciled. The decisions are not harmonious and the opinions are frequently misleading. But much of the confusion is unquestionably due to a failure by many courts to distinguish carefully between a conditional and an absolute revocation.

There may well be a true conditional revocation. A typical case is where a testator makes the destruction of his will depend for its operation upon the efficacy of an intended new disposition. It is clear that in such circum-

⁶ *Meyer v. Johnston*, *supra*.

⁷ See dissenting opinion of Walker, J., in *Humphreys v. Allen*, 101 U. S. 490.

⁸ *Raht v. Attrill*, 106 N. Y. 423 ; *Farmers, etc., Trust Co. v. Coal Co.*, 50 Fed. 481 ; *Hooper v. Central Trust Co.*, 81 Md. 559, 591.

stances, if the attempted disposition fails to take effect in the manner intended, the physical act of destruction is deprived of all revoking efficacy.¹ The condition upon which alone the revocation was intended to operate is unfulfilled and the *animus revocandi* essential to every valid revocation is, therefore, lacking.² On the other hand, the mere intention to make a new will in the future should not raise a presumption of a conditional revocation. The solution of each case turns upon the intent of the testator, and that, as a question of fact, is for the jury to determine.³ A deliberate destruction *animo revocandi* clearly operates as a complete revocation, even though the testator also intends to execute a new will in the future, but fails to do so.⁴

A more difficult question arises in the case of revocations founded on mistake. Suppose, for example, that the testator destroys his will under the mistaken supposition that he has made another valid will. A recent English decision holds, in accordance with previous authority,⁵ that the first will is not revoked. *Estate of Irvin*, 25 T. L. R. 41 (Prob. D., Nov. 2, 1908). And the same result has been reached where a testator strikes out,⁶ or partially erases⁷ the name of a legatee and substitutes the name of another, or increases⁸ or reduces⁹ the gift which he has previously made, without authenticating the changes by a new attestation in the presence of witnesses. In like manner, it is well settled that a will is not revoked by a subsequent will made under a mistake of fact.¹⁰ On the other hand, a different result is reached by the courts where the revocation is founded on advice which turns out to be false. Such a revocation is not treated as conditional or dependent upon the soundness of the advice.¹¹ An exception is also made where the subsequent instrument contains a revoking clause, and a new disposition which is invalid. The rule in such cases appears to be that the revoking clause is not regarded as conditioned upon the efficacy of the disposing part and that the revocation should stand.¹²

The extension of the doctrine to revocations founded on mistake seems, however, open, both theoretically and practically, to serious objection. The theory upon which the courts proceed appears to be that the presence of the mistake prevents the *animus revocandi*.¹³ But the fallacy in this view

¹ *Dixon v. The Solicitor to the Treasury*, [1905] P. 42.

² *Cf. Giles v. Warren*, L. R. 2 P. & D. 401.

³ See *McIntyre v. McIntyre*, 120 Ga. 67, 71.

⁴ *Semmes v. Semmes*, 7 H. & J. (Md.) 388; *Estate of Olmstead*, 122 Cal. 224. But see *Goods of Applebee*, 1 Hagg. Eccl. 143.

⁵ *Scott v. Scott*, 1 Sw. & Tr. 258; *Dancer v. Crabb*, L. R. 3 P. & D. 98; *Wilbourn v. Shell*, 59 Miss. 205.

⁶ *Wolf v. Bollinger*, 62 Ill. 368.

⁷ *Goods of McCabe*, L. R. 3 P. & D. 94.

⁸ *In re Knapen's Will*, 75 Vt. 146.

⁹ *Locke v. James*, 11 M. & W. 901; *Soar v. Dolman*, 3 Curt. Eccl. 121.

¹⁰ *Doe d. Evans v. Evans*, 10 A. & E. 228; *Campbell v. French*, 3 Ves. Jr. 321. The conditions, however, which the testator assumed to exist, and the assumed existence of which induced the revocation, must appear on the face of the subsequent revocatory instrument. *Skipwith v. Cabell*, 19 Grat. (Va.) 758; *Gifford v. Dyer*, 2 R. I. 99. But see *Goods of Moresby*, 1 Hagg. Eccl. 378.

¹¹ *Atty. Gen. v. Lloyd*, 1 Ves. Sr. 32. Revocation is also held to result where the facts are peculiarly within the knowledge of the testator. *Mendinhall's Appeal*, 124 Pa. 387; *Hayes v. Hayes*, 21 N. J. Eq. 265. But see *In re Taylor's Estate*, 22 Ch. D. 495.

¹² *Price v. Maxwell*, 28 Pa. 23; *Hairston v. Hairston*, 30 Miss. 276; *Tupper v. Tupper*, 1 K. & J. 665. Compare *Quinn v. Butler*, L. R. 6 Eq. 225, with *Locke v. James*, 11 M. & W. 901.

¹³ See, for example, *Locke v. James*, *supra*.

is that it overlooks the distinction between incompleteness and completeness induced by mistake. The revocation in this class of cases is not in any sense conditional. The mistake simply operates as the inducement to the complete act of revocation and does not prevent its coming into being.¹⁴ Equity, however, might well relieve against such a revocation where to do so would more nearly carry out the intention of the testator.¹⁵ There would, moreover, seem to be no valid practical objection to the setting aside of the revocation by the probate courts provided the equitable basis of their action were recognized.¹⁶ As it is, they have frequently unconsciously done the work of equity,¹⁷ but the failure to make the above distinction has resulted in many decisions which seem to do violence to the intention of the testator.¹⁸

LIMITATIONS UPON THE SERVICE AND ENFORCEMENT OF SUBPŒNAS. — As a general rule, a subpœna may be taken out by any party to a suit without special leave of the court.¹ Originally defendants indicted for capital felonies were not included within this rule,² but by statutes they have generally been placed upon an equal footing with other parties.³ The general rule is, however, subject to many limitations. Thus it is within the discretion of the court to refuse to allow an excessive number of witnesses to be summoned,⁴ and where the defendant may subpœna witnesses at the state's expense, the courts generally require him to show that the desired witnesses will be able to give material evidence.⁵ Moreover, the right to have subpœnas issued is broader than the right to compel attendance in obedience thereto. The right guaranteed by the Sixth Amendment and by various state statutes to have compulsory process for obtaining witnesses is limited to the right to have subpœnas served.⁶ The theoretical basis for this view is that in the eighteenth century the practice of compelling attendance of witnesses by attachment was not well settled in England,⁷ so that the right to have compulsory process, if strictly interpreted, then meant merely that the subpœnas should be served; and if they were not obeyed, the aggrieved party was left to his action for damages.⁸ From a practical standpoint a subpœna may frequently be issued as a matter of course, whereas upon further information it would

¹⁴ Cf. *Edmunds v. Merchants' Despatch, etc., Co.*, 135 Mass. 283.

¹⁵ *Onions v. Tyrer*, 2 Vern. 742; *Campbell v. French*, 3 Ves. Jr. 321.

¹⁶ Cf. in the law of sales where the courts in allowing the action of trover, *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, or replevin, *John V. Farwell Co. v. Hilton*, 84 Fed. 293, against the fraudulent vendee of a chattel are really doing equitable work. The fraudulent vendee is a constructive trustee, and the allowance of the action is in essence nothing else than specific enforcement of his obligation to return the title wrongfully acquired by him.

¹⁷ See *Powell v. Powell*, L. R. 1 P. & D. 209; *Goods of McCabe*, *supra*.

¹⁸ The probate courts should face the question squarely, recognize that a revocation induced by mistake is not really conditional, and either refuse to do equitable work or disregard the revocation and revive the old will only where that result is clearly the intent of the testator.

¹ *Raymond v. Tapson*, 22 Ch. D. 430.

² See 2 Hawk. P. C., c. 46, § 165.

³ See *West v. Wisconsin*, 1 Wis. 209.

⁴ *Butler v. State*, 97 Ind. 378.

⁵ *Jenkins v. Florida*, 31 Fla. 190. See *State v. Graves*, 13 Wash. 485.

⁶ *State v. Stewart*, 117 La. 476.

⁷ See *Bowles v. Johnson*, 1 W. Bl. 35.

⁸ See argument of counsel in *People v. Smith*, 3 Wheeler Cr. Cas. (U. S. C. C.) 134 *et seq.*

not be proper to allow an attachment. Thus where a witness fails to attend, and gives as his excuse that he knows no evidence relevant to the issue or that the subpoena was had merely for vexatious purposes, the court upon being convinced of these facts may order the subpoena to be set aside.⁹ Such was the decision very properly made in a recent English case where subpoenas were served upon the Prime Minister and the Home Secretary. *Rex v. Baines*, 25 T. L. R. 79 (Eng., K. B., Nov. 18, 1908).

The ministers did not attempt to rely upon their official position as a ground for not appearing, and it is apparently settled in England that dignity of office exempts no one except the King from the service of a subpoena.¹⁰ Since the President of the United States, like the Prime Minister of England, is not above the law, the best view is that a subpoena may properly be served upon him.¹¹ *A fortiori*, subpoenas may be served upon members of the cabinet¹² and congressmen.¹³ But although dignity of office does not prevent the service of subpoenas and cannot properly be set up as an excuse for disregarding them, yet official duties may be a sufficient excuse for not appearing in court.¹⁴ How far the courts should attempt to enforce obedience to subpoenas in such cases is largely a question of expediency. It is generally better that high officials should give their undivided attention to affairs of state than that they should be forced to attend trials of comparatively little importance. When a subpoena *duces tecum* is served, the President, or even a governor, is justified in refusing to bring the desired papers into court, because he is necessarily the judge as to whether their contents ought to be kept secret;¹⁵ for the court could not pass upon this question unless their contents were first disclosed. When only attendance *ad testificandum* is required, executive privilege is not as well established either in reason or in practice, but as a general rule the court should assume that the executive is acting properly and that his absence is due to his official duties or engagements rather than to contempt of court.¹⁶

RECENT CASES.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — JURISDICTION OVER STATE RECEIVER. — A corporation was adjudged bankrupt on the ground that within four months a receiver had been appointed because of its insolvency, by a state court. On application by the trustee in bankruptcy the state court refused to direct its receiver to turn over to the trustee the property of the bankrupt. The trustee then applied to the bankruptcy court for a summary

⁹ *In re Mundell*, 52 L. J. Ch. 756. See also *Dicas v. Lawson*, 4 L. J. Exch. 80; *Tinley v. Porter*, 2 M. & W. 822; *Steele v. Savory*, 8 T. L. R. 94; *Morgan v. Morgan*, 16 Abb. Prac. (N. S.) 291.

¹⁰ See *Felkin v. Lord Herbert*, 1 Dr. & Sm. 608; 1 Bl. Comm. ch. VII.

¹¹ See *United States v. Burr*, 25 Fed. Cas. 1.

¹² See *People v. Smith*, *supra*.

¹³ Art. I, § 6 of the federal Constitution would prevent enforcement of a subpoena by attachment, while a congressman is in attendance at or going to or from a session of Congress. *Republica v. Duane*, 4 Yeates (Pa.) 347; *United States v. Thomas*, 28 Fed. Cas. 79. But the tendency of the federal courts to give exemption even from the service of a subpoena during such time does not seem justified. See *Miner v. Markham*, 28 Fed. 387. *Contra*, *Wilder v. Welsh*, 1 McArthur (D. C.) 566.

¹⁴ See *Thompson v. German Valley Railroad Co.*, 22 N. J. Eq. 111.

¹⁵ *Thompson v. German Valley Railroad Co.*, *supra*.

¹⁶ *Appeal of Hartranft*, 85 Pa. St. 433.

order on the receiver. *Held*, that he is entitled to the order. *In re Hecox*, 164 Fed. 823 (C. C. A., Eighth Circ.).

The amendment of 1903 to § 3a of the Bankruptcy Act of 1898 declares it to be an act of bankruptcy that because of insolvency a receiver has been put in charge of property, under a state law. An adjudication of involuntary bankruptcy is conclusive of the commission of the acts of bankruptcy charged. *In re American Brewing Co.*, 112 Fed. 752. And there can be no collateral attack on the decision of the state court: it can only be reviewed in direct proceedings. *Edelstein v. United States*, 149 Fed. 636. As the Bankruptcy Act is a national law, passed pursuant to the power given to Congress by the Constitution, it suspends the operation of all conflicting state bankruptcy laws. *In re Gutwilling*, 90 Fed. 475. As is pointed out in the principal case, it is therefore a mere matter of judicial courtesy for the federal court to direct its trustee to petition the state court for an order. Indeed, if the state court should in any way try to retain such property in its possession the federal court could enforce its decree by means of physical force exercised through its official agents. See *Ex parte Siebold*, 100 U. S. 371, 395.

BILLS OF PEACE — BILL TO AVOID NUMEROUS ACTIONS OF TRESPASS AT LAW. — The plaintiff brought a bill to enjoin the defendant from continually trespassing on his land. The defendant did not deny the plaintiff's title, but demurred on the ground that the plaintiff had an adequate remedy at law. *Held*, that the demurrer be overruled. *Cragg v. Levinson*, 37 Nat. Corp. Rep. 614 (Ill., Sup. Ct., Dec. 15, 1908). See NOTES, p. 371.

CONFLICT OF LAWS — EFFECT AND PERFORMANCE OF CONTRACTS — NOTE MADE IN ONE STATE AND PAYABLE IN ANOTHER. — A promissory note was made in Kansas and payable in Missouri. *Held*, that its negotiability is governed by the law of Missouri. *Sykes v. Citizens' Nat. Bank*, 98 Pac. 206 (Kan.).

The negotiability of a note is generally governed by the law of the place where it is made. *Corbin v. Planters Nat. Bank*, 87 Va. 661. But there seems to be considerable conflict as to what law governs when the note is made in one place and payable in another. It has even been said, on the erroneous assumption that negotiability relates to the form of the remedy instead of to the nature of the contract, that the *lex fori* governs. See *Roads v. Webb*, 91 Me. 406. And it has been held that the parties may elect to be governed by the law of either jurisdiction. *Arnold v. Potter*, 22 Ia. 194. And that the naming of a place for payment shows *prima facie* intent to be governed by that law. *Shoe and Leather Nat. Bank v. Wood*, 142 Mass. 563. The weight of authority is with the main case that the law of the place of payment governs in the absence of express stipulation to the contrary. *Brown v. Gates*, 120 Wis. 349. The correct view, it seems, is that the law of the place where the note is made should govern. *Ory v. Winter*, 4 Mart. (N. S.) (La.) 277; 2 Beale, Cas. Conf., 511 and note.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — EXTRA-TERRITORIAL EFFECT OF ADOPTION. — A of Georgia adopted B of Georgia, and died leaving land in Alabama. B claimed that he was entitled to succeed to this land. By a statute in Georgia an adopted child gained the right of inheritance. By a statute in Alabama adoption gave the person adopted the right to inherit, but the adoption was required to be by acknowledgment and registration in the probate court. *Held*, that B is not entitled to the land. *Brown v. Finley*, 47 So. 577 (Ala.). See NOTES, p. 372.

CONSTITUTIONAL LAW — TRIAL BY JURY — COMPULSORY REFERENCE OF ACCOUNTS IN CIVIL CASE. — An action in which a counterclaim involved a long examination of accounts was referred over the plaintiff's objection. *Held*, that this compulsory reference is unconstitutional because it denies the plaintiff

the right of trial by jury guaranteed by the state constitution. *Snell v. Niagara Paper Mills*, 86 N. E. 460 (N. Y.).

The amendment to the Constitution of the United States, concerning the right of trial by jury, does not apply to civil actions in state courts. *Walker v. Sauvinet*, 92 U. S. 90. This ancient right is protected in the state constitutions by a declaration that the right shall remain inviolate, or by an equivalent provision. See SEDGWICK, STAT. AND CONST. LAW, 2 ed., 482. Therefore it is necessary to determine whether a jury trial was a matter of right prior to the adoption of the state constitution. Some colonial courts, because of the difficulty in giving such a question to a jury, sent to a referee any action in law involving a long account. So, although a compulsory reference defeats a jury trial, it is not unconstitutional in the states that had formerly allowed this practice. *Creve Cœur Lake Ice Co. v. Tam*, 138 Mo. 385; *Monitor Iron Works v. Ketchum*, 47 Wis. 177. But it was never allowed in some states. *Francis v. Baker*, 11 R. I. 103. And a compulsory reference is unconstitutional in the federal courts. *United States v. Rathbone*, 2 Paine (U. S.) 578. A long account is ordinarily referable in New York, but when it appears in a counterclaim, a compulsory reference is held unconstitutional, because early practice would not have allowed such a reference. *Steck v. Colorado F. & I. Co.*, 142 N. Y. 236. This is properly followed in the main case. But see *Monitor Iron Works v. Ketchum*, *supra*.

CONTEMPT — POWER TO PUNISH FOR CONTEMPT — WHEN SWORN DENIAL BY DEFENDANT IS CONCLUSIVE. — In a proceeding for contempt, under a charge of attempting to influence talesmen summoned on the jury, the defendant in a sworn statement denied some of the acts charged and denied any intention to influence the talesmen by the admitted acts. The court admitted further evidence to refute this statement, and the defendant was convicted. *Held*, that it is not error to admit this evidence. *Coleman v. State*, 113 S. W. 1045 (Tenn.).

In an action for contempt the old common law rule was that the defendant might purge the contempt by a sworn statement of denial. *Underwood's Case*, 2 Humph. 46. In some states statutes have reversed the common law rule. *Drady v. District Court*, 126 Ia. 345. And it seems never to have been adopted in equity. *United States v. Debs*, 64 Fed. 724. When the contempt charged consists of certain unambiguous facts, the common law rule is not generally accepted and evidence may be admitted contradicting the defendant's denial. *United States v. Shipp*, 203 U. S. 563. Thus the defendant's denial is not conclusive when the act of contempt has been the publication of matter libellous *per se*. *In re Chadwick*, 109 Mich. 588. *Contra*, *In re Robinson*, 117 N. C. 533. But when the matter published is of an ambiguous nature and clearly open to explanation, the defendant's denial of intent to act in contempt will be conclusive. *Fishback v. State*, 131 Ind. 304. Since, however, the acts charged in the principal case were unambiguously in contempt, the defendant's denial should not bar the admission of further evidence in rebuttal.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — EXTERIOR ADVERTISING ON PUBLIC OMNIBUS. — The plaintiff corporation maintained large, highly colored advertising signs upon the outside of its omnibuses. When threatened with interference by the city, the plaintiff sought to enjoin municipal action. *Held*, that an injunction will not be granted, as the plaintiff in engaging in exterior advertising is acting *ultra vires*. *The Fifth Avenue Coach Co. v. City of New York*, 40 N. Y. L. J. 1587 (N. Y., Ct. App., Jan. 5, 1909).

This decision affirms the decision of the lower court, commented upon in 21 HARV. L. REV. 445.

CORPORATIONS — CORPORATIONS DE FACTO — RECEIVER FOR DE FACTO CORPORATION. — A receiver was appointed for an insolvent railroad corporation, and he sold some of its property. There was a defect in the incorporation of the railroad on account of a failure to file an affidavit required by the statute.

Later this defect was cured *ab initio* under statutory provision. *Held*, that the acts of the receiver are valid. *Matter of New York, W. & B. Ry. Co.*, 193 N. Y. 73. See NOTES, p. 369.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — RIGHT OF SET-OFF. — The plaintiff obtained a judgment against the defendant corporation and the execution was returned *nulla bona*. A bill in equity was then brought to enforce a stockholder's liability for unpaid stock in satisfaction of the judgment. *Held*, that the stockholder may set off against such liability a *bona fide* indebtedness of the corporation to himself. *Austin Powder Co. v. Commercial Lead Co.*, 114 S. W. 67 (Mo., St. L. Ct. App.).

It is well settled that the liability of the stockholders on unpaid stock is an asset of an insolvent corporation available to the creditors through a bill in equity after the remedies at law have been exhausted without satisfaction. *Hickling v. Wilson*, 104 Ill. 54. And when proceedings are taken to wind up a corporation or to take an account of its assets for a rateable distribution among all the creditors, a stockholder cannot set off against his statutory liabilities or his liability on unpaid stock any debt of the corporation to himself. *Shickle v. Watts*, 94 Mo. 410, 418; *Matter of Empire City Bank*, 18 N. Y. 199, 227. To allow him to do so would be to give him a preference as creditor by reason merely of his position as stockholder. But where an individual judgment creditor is seeking equitable execution against the liability for unpaid stock as a corporation asset, it seems just to allow the stockholder to set-off such indebtedness; for the petitioning creditor is no more entitled to a preference than is the stockholder. *Christensen v. Colby*, 43 Hun (N. Y.) 362.

CRIMINAL LAW — TRIAL — PRESENCE OF ACCUSED IN CAPITAL CASE AT RENDITION OF VERDICT. — The accused, who was indicted for murder, was on bond. When the case was given to the jury he left the court room, and before his return the jury rendered a verdict of guilty of manslaughter. *Held*, that the receiving of the verdict in the absence of the prisoner is reversible error. *Sherrod v. State*, 47 So. 554 (Miss.).

In non-capital felonies it has been frequently held that the prisoner may waive his right to be present at the rendition of the verdict. *State v. Kelly*, 97 N. C. 404. *Contra, Prine v. Commonwealth*, 18 Pa. St. 103. The distinction taken by the court in the principal case between capital and other cases seems artificial. It is argued that the accused and the public are more interested in his life than in his liberty. But in neither case has the right to be present at the verdict any practical value; for a conclusion is reached before the jury returns. The arguments against waiver are essentially historical. One is that the court can have no jurisdiction over the accused if he is at large. *Andrews v. State*, 2 Sneed (Tenn.) 550. Another is that the jury ought to see the prisoner. *Rex v. Lad-singham*, T. Raym. 193. These considerations apply today with equally much or little force to capital and to non-capital crimes. One rule should, accordingly, cover both cases, and that rule is conceived to be the better which limits the opportunities for merely technical reversal. See 11 HARV. L. REV. 409; 15 *ibid.* 412.

DAMAGES — MEASURE OF DAMAGES — EXTENSION OF ENGLISH RULE IN CONTRACTS FOR SALE OF REALTY. — The plaintiff and the defendant made a contract whereby the defendant was to have free access to certain tips, to take and carry away therefrom, at a specified rate per ton, such quantity of slag as he might desire. The plaintiff was unable to perform, for want of title to the slag. In an action brought by him, the defendant counterclaimed for this breach. The trial court found that the slag had become part of the ground itself. *Held*, that the defendant can recover only nominal damages on his counterclaim. *Morgan v. Russell & Sons*, 25 T. L. R. 120 (Eng. K. B., Nov. 26, 1908).

In suits for breach of contract to sell land, the majority of courts in this

country do not depart from the general rule allowing the vendee to recover substantial damages. *Hopkins v. Lee*, 6 Wheat. (U. S.) 109. In England, however, an exception is made in such contracts if the vendor, whether in good or bad faith, refuses to perform because he has no title; for he is then liable only in nominal damages. *Bain v. Fothergill*, L. R. 7 H. L. 158. The same rule prevails in Pennsylvania. *Burk v. Serrill*, 80 Pa. 413. In a few states nothing less than fraud, bad faith, or misconduct, subjects the vendor to liability in substantial damages. *Margraf v. Muir*, 57 N. Y. 155. In others, however, mere knowledge by the vendor of his inability to give good title makes him so liable. *Plummer v. Rigdon*, 78 Ill. 222. The English doctrine was early applied to a contract for the sale of a term for years. *Pounsett v. Fuller*, 17 C. B. 660. And the reasons given for its establishment apply with equal force to the present decision which brings within the rule a contract for the sale of a *profit à prendre*. See *Bain v. Fothergill*, *supra*.

DAMAGES — MEASURE OF DAMAGES — SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACT. — A, having substantially performed a building contract, sued B for the agreed price. B counterclaimed for defects in performance. *Held*, that the measure of the defendant's compensation is the reasonable cost of remedying the defects that are practically remediable, and such further sum as will measure the actual diminished value of the structure because of defects not so remediable. *Forller v. Heintz*, 118 N. W. 543 (Wis.).

Although modern cases generally allow a recovery on a building contract substantially performed, there has been no consistent rule in measuring compensation to the owner for defects. The measure has been stated to be the difference in value between substantial performance and perfect performance. *Wagner v. Allen*, 174 Mass. 563. Also the defendant's compensation has been computed from damage sustained by reason of the defects. *Kane v. Stone Co.*, 39 Oh. St. 1. But as there may be no difference in value and no actual damage, the owner might get no compensation whatever, although not getting what he contracted for. Where the owner is allowed what would make good all defects in performance a fairer result is reached. *Feeney v. Bardsley*, 66 N. J. L. 239. This is an application of the first part of the Wisconsin rule. But if remedying a slight defect would entail a grossly disproportionate expense the contractor would have only a barren recovery. In such circumstances the latter part of the Wisconsin rule would apply. On the whole, the rule in the principal case would seem to work justice everywhere.

EMINENT DOMAIN — COMPENSATION — RESERVATION OF CLAIM FOR INJURIES TO STRUCTURES. — A leased from B two lots upon which he erected structures for an entire plant. On condemnation of one lot for public purposes A surrendered his lease to B with all claims for damages except such as he had by reason of injuries to structures on the remaining lot. In the condemnation proceedings A claimed the damages so reserved. *Held*, that he may recover. *Matter of City of New York*, 193 N. Y. 117.

On condemnation of land by eminent domain proceedings, the compensation is apportioned between the landlord and the tenant according to their interests. *Dyer v. Wightman*, 66 Pa. St. 425. See *Harris v. Howes*, 75 Me. 436. And where part of an entire tract is taken the measure of damages includes the resulting diminution in value of the residue. *South Buffalo Ry. Co. v. Kirkover*, 176 N. Y. 301. Thus it has been held that a lessee may recover for diminution in value of his leasehold and fixtures through condemnation of a portion of the property. *Phila., etc., R. R. Co. v. Getz*, 113 Pa. St. 214. In the present case the surrender prevented any damage in respect to the leasehold. But the reservation of the claim for damages to the structures is in effect an agreement that their title shall remain in the former tenant. Hence compensation for their depreciation is rightly awarded him. Because easements are regarded as inseparable from the dominant estate, a grantor, in spite of a reservation in his deed, cannot recover damages for their invasion after the grant. *McKenna v. B. U. El. R. R. Co.*, 184 N. Y. 391. But recovery can be had for

damage incurred before conveyance. *Pegram v. N. Y. El. R. R. Co.*, 147 N. Y. 135.

EMINENT DOMAIN — COMPENSATION — VALUATION OF SPECIAL ADAPTABILITY OF LAND TAKEN. — A water board having obtained statutory powers for the construction of a reservoir, determined to take the claimant's land, which was especially adapted for reservoir purposes. The land could not have been so used by other possible competitors without their first obtaining parliamentary powers. *Held*, that the special adaptability may be considered as an element of value, but it is the contingent value due to the possibility of the land's coming into the market that is considered and not the value of the realized possibility, due to the fact that the promoters have obtained statutory powers. *In re Lucas & Chesterfield Gas and Water Board*, [1909] 1 K. B. 16.

The market value is the proper test of compensation for land taken by eminent domain. *City of Santa Ana v. Harlin*, 99 Cal. 538. Everything which gives the land intrinsic value should be taken into consideration. *Shenango & Allegheny R. R. Co. v. Braham*, 79 Pa. St. 447. So a special adaptability to any particular purpose is relevant provided there is a contingent possibility that the property will be put to that use. *Boom Co. v. Patterson*, 98 U. S. 403. It is always a question, however, whether this contingent possibility in fact exists. The court seems right in holding that its existence is not prevented by the need of further statutory powers. But when the special value exists only for the particular purchaser who has the compulsory powers, it is not to be considered. See *In re Countess Ossalinsky & Manchester Corporation*, Q. B. D. 1883; BROWN AND ALLAN, LAW OF COMPENSATION, 2 ed., § 659. To consider it then would be to test the compensation by the value to the buyer — the realized possibility. On the other hand, where the special value exists also for other possible purchasers, so that there is a real though limited market, then, even though there are at the moment no competitors, there is a real contingent possibility, which is universally considered an element of value. *In re Gough & Aspatria, etc., Water Board*, [1904] 1 K. B. 417.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — ENJOINING STATE COMMISSION FROM ENFORCING RAILROAD RATES. — A state commission was established with power to fix and enforce railroad rates, subject to review on appeal to the highest state court. Without appealing thereto, the plaintiff railroad sued the commission in the federal court to restrain the enforcement of a rate alleged to be confiscatory. *Held*, that the bill should be retained to await the result of an appeal to the highest state court. *Prentiss v. Atlantic Coast Line Co.*, U. S. Sup. Ct., Nov. 30, 1908. See NOTES, p. 368.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — POWER OF COURT OF BANKRUPTCY TO RETAIN POSSESSION OF BANKRUPT'S PROPERTY. — A bankrupt corporation had in its possession show-cases purchased from the defendant in error, the price for which had not been paid. On the bankruptcy of the company, the court appointed the plaintiff in error receiver of the bankrupt's property and he took possession of all the property including the show-cases. The defendant in error, claiming that the title to the show-cases had never passed to the bankrupt, sued out a writ of replevin in the state court and got judgment. The receiver brought a writ of error to the U. S. Supreme Court. *Held*, that the judgment be reversed. *Murphy 2d v. Hofman Co.*, U. S. Sup. Ct., Jan. 4, 1909.

For a discussion of the principles involved, see 21 HARV. L. REV. 433.

GARNISHMENT — EFFECTS OF GARNISHMENT — LIABILITY OF SURETY FOR INTERFERENCE WITH GARNISHEE'S CONTRACT. — A entered into a contract with B by which B agreed to mill and sell A's rice crop. C brought suit against A and garnished B. B stopped milling, believing he had no authority to proceed with the contract. C lost his suit against A. As C was insolvent A sued D, the surety on the garnishment bond, claiming damages for interference with

performance of the contract. *Held*, that he cannot recover. *Moore and Bridgman v. U. S. Fidelity and Guaranty Co.*, 113 S. W. 947 (Tex., Civ. App.).

Garnishment in no way changes the situation of the parties except that the defendant's claim against the garnishee is thereby transferred to the plaintiff. *North Chicago Rolling Mill Co. v. St Louis Ore and Steel Co.*, 152 U. S. 596. A garnishee loses none of those rights of set-off and defense which existed or were actually accruing at the time of the service of attachment and which might have been asserted by him had the defendant himself sought to enforce the claim. *Farmers' and Merchants' Bank v. Franklin Bank*, 31 Md. 404. Nor are his rights enlarged. See *Fifield v. Wood*, 9 Ia. 249. On these principles a factor receiving goods for sale and making advances thereon cannot, by garnishment, be deprived of his right to sell. *White Mountain Bank v. West*, 46 Me. 15. Moreover, the garnishee is entitled to the benefit of any existing contract he may have with the defendant. *Baltimore and Ohio R. R. Co. v. Wheeler*, 18 Md. 372. So, in the principal case, the contract was in no way affected. Recovery on an attachment bond is limited to such damages as are the direct result of the wrongful attachment. *Higgins v. Mansfield*, 62 Ala. 267. But a misconception by the garnishee of the legal consequences of the attachment cannot be considered such a direct result. *Goodbar v. Lindsley*, 51 Ark. 380.

HABEAS CORPUS — LEGAL EXISTENCE OF COURT ATTACKED IN HABEAS CORPUS PROCEEDINGS. — The relator, who had been convicted and sentenced to imprisonment, brought a writ of *habeas corpus*, alleging that the court that tried him was not legally created, in that the legislative act on which it was founded had been vetoed by the governor, and not passed by a sufficient majority thereafter. *Held*, that the legal existence of a court organized and created under color of law cannot be inquired into in *habeas corpus* proceedings. *State ex rel. Bales v. Bailey*, 118 N. W. 676 (Minn.).

Unless a court is created by the constitution or by a valid act of the legislature, it has no jurisdiction. *Re Norton*, 64 Kan. 842. And all proceedings before a court without jurisdiction are void. *Ex parte Jones*, 27 Ark. 349. So an imprisonment by such a court is an unlawful detention of the person, for which relief is given by *habeas corpus*. *People v. McLeod*, 1 Hill (N. Y.) 377. But it is believed that when jurisdiction depends on the constitutionality of a statute, the statute should not be tested in such hurried proceedings; though, it is true, this contention does not seem to be universally supported by the authorities. See *Ex parte Snyder*, 64 Mo. 58; *Ex parte Pitts*, 35 Fla. 149. The Minnesota rule, however, as here laid down, is based on the supposedly analogous case of a *de facto* judge, it being settled that his position cannot be attacked collaterally. See *Burt v. Winona & St. Peter R. Co.*, 31 Minn. 472. But the analogy fails; for whereas a *de facto* court has no jurisdiction, the very existence of a *de facto* judge depends on the existence of a *de jure* court, and his acts are binding on third parties and are only reviewable by the state. *Clark v. Commonwealth*, 29 Pa. St. 129. See *Norton v. Shelby County*, 118 U. S. 425.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — COMMISSION'S POWER TO INTERROGATE. — In the course of an investigation the Interstate Commerce Commission interrogated the defendant with the object of ascertaining whether the directors of a railroad engaged in interstate business had expended its funds while the defendant was an officer of the railroad in buying stocks at inflated prices, or stocks that should not have been purchased. On refusal to answer, suit was instituted to compel him to do so. *Held*, that he need not answer. *Interstate Commerce Commission v. Harriman*, U. S. Sup. Ct., Dec. 14, 1908.

This decision reverses the decision of the lower court, commented upon in 21 HARV. L. REV. 431.

JUDGMENTS — SATISFACTION — EFFECT OF EXECUTION SALE OF EX-EMPT PROPERTY. — A judgment creditor levied on and sold property of the

debtor in satisfaction of his judgment. The property was exempt from execution, and the debtor recovered damages against the creditor in trespass. He later moved to have the judgment against him entered as satisfied. *Held*, that the sale satisfies the judgment. *Johnson v. Motlow*, 47 So. 568 (Ala.).

If, by reason of any defects in the execution or proceedings thereon, no title passes by a judgment sale, the satisfaction is set aside and the creditor may still enforce his original judgment. *Townsend v. Smith*, 20 Tex. 465. But if the sale fails to pass any title because the debtor has no title to the property sold, it has been held that the judgment is irrevocably satisfied. *Vattier v. Lytle's Executors*, 6 Oh. 478; *Halcombe v. Loudermilk*, 48 N. C. 491. Other courts have held that in these circumstances the satisfaction should be vacated, and the creditor allowed to recover on his first judgment. *Adams v. Smith*, 5 Cow. (N. Y.) 280; *Cowles v. Bacon*, 21 Conn. 451. The latter view seems to be the better; for a proceeding which transfers no legal title and deprives the debtor of nothing, should not operate in satisfaction of a judgment against him. The situation in the principal case is similar. The property which formed the subject of the sale being exempt from execution, the creditor derives no real benefit from the sale. It is therefore submitted that such a sale should not be regarded as satisfying the judgment. *Piper v. Elwood*, 4 Den. (N. Y.) 165.

LANDLORD AND TENANT—COVENANTS IN LEASES—WHETHER COVENANT INDIRECTLY AFFECTING VALUE RUNS WITH LAND.—A lease from A to B contained a proviso for reëntury in case of breach of B's covenant to repair. In making a sublease of part of the premises to C, B covenanted that he would repair the part of the premises retained. The defendant, B's assignee, failed to repair, whereupon A reëntered and ejected the plaintiff, C's assignee. *Held*, that B's covenant to C did not run with the land sublet so as to give C's assignee a right of action. *Dewar v. Goodman*, 25 T. L. R. 137 (Eng., H. of L., Dec. 3, 1908).

This decision affirms the decision of the lower court, commented upon in 20 HARV. L. REV. 577.

LICENSES—REVOCATION AFTER LICENSEE HAS ACTED ON PAROL LICENSE AND INCURRED EXPENSE.—B was given a parol license to erect a telephone line across A's land. B thereupon incurred expense, acting on the license. *Held*, that the license is revocable. *Yeager v. Tuning*, 6 Oh. L. Rep. 94 (Oh., Sup. Ct., Dec. 1, 1908).

To hold the license irrevocable would violate the Statute of Frauds unless it can be justified by the doctrine of equitable estoppel. See 13 HARV. L. REV. 54. But a license in itself does not involve a representation that it will not be revoked. See *Babcock v. Utter*, 1 Abb. Dec. (N. Y.) 27, 60. The only plausible basis for estoppel here, therefore, lies in extending the equitable doctrine of part performance. *Potter v. Jacobs*, 111 Mass. 32. See 14 HARV. L. REV. 64. But this doctrine is contrary to the spirit of the Statute of Frauds and therefore has been confined strictly to cases where the terms of the contract are clear. *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131, 149; *Allen v. Webb*, 64 Ill. 342. Where a mere license is given there is no express agreement to grant an easement, and it is by no means certain that the parties so intend. To imply such an agreement and then enforce it on the doctrine of part performance, is an inexcusable extension of that much doubted doctrine. If the Statute of Frauds is a wise enactment, the true equity lies in following it, not in evading it by converting a parol license into an easement.

MORTGAGES—PRIORITIES—PURCHASE MONEY MORTGAGE AND JUDGMENT LIEN.—A executed a deed of land to B, who simultaneously executed a security deed to C for part of the purchase price, which C paid over to A. The deeds were duly recorded. There was a prior recorded judgment against B. *Held*, that the mortgage is superior to the judgment lien. *Protestant Episcopal Church v. Lowe*, 63 S. E. 136 (Ga., Sup. Ct.).

A purchase money mortgage to the vendor executed simultaneously with his

deed of the land has priority over a previously recorded judgment lien against the vendee. *Scott, Carhart & Co. v. Warren*, 21 Ga. 408. Likewise it is superior to a mechanic's lien and even to a prior recorded mortgage for part of the purchase price. *Clark v. Butler*, 32 N. J. Eq. 664; *Rogers v. Tucker*, 94 Mo. 346. And the right of dower and homestead rights are subject to such mortgage. *Mayburry v. Brien*, 15 Pet. (U. S.) 21; *Roby v. Bismarck Natl. Bank*, 4 N. D. 156. This rule of priority has been extended to cases where the mortgage is to a third party. *Haywood v. Nooney*, 3 Barb. (N. Y.) 643. Nor does it matter that the mortgage is for a part only of the purchase price. *Courson v. Walker*, 94 Ga. 175. The theory usually advanced by the courts, that the liens cannot attach to such an instantaneous seisin, seems a fiction. For the rule applies even though there is an interval between the deeds, provided they all constitute one transaction. *Stewart v. Smith*, 36 Minn. 82. And no priority is given a mortgage simultaneously executed to secure debts other than the purchase money. *Van Loben Sels v. Bunnell* 120 Cal. 680. The true theory would seem to be that, owing to the vendor's equity, the vendee is at no time beneficially seised of the land. See *N. J. Building, etc., Co. v. Bachelor*, 54 N. J. Eq. 600.

MUNICIPAL CORPORATIONS — ACTIONS BY AND AGAINST MUNICIPAL CORPORATIONS — CITY IN MORE THAN ONE COUNTY. — The New York Code makes jurisdiction over domestic corporations dependent upon residence. *Held*, that New York City, whose principal offices are in New York County, is not subject to suit in the Kings County courts. *Maisch v. City of New York*, 40 N. Y. L. J. 1097 (N. Y., Ct. App., Dec. 1, 1908).

It is generally held that a city may, even in transitory actions, be sued only in the county that includes it. *Oil City v. McAbey*, 74 Pa. 249. This rule may rest on the principle either that a city should be sued at its place or places of residence, or that it should be subject to suit in one place only. The latter reasoning would clearly justify the holding in the principal case. But granting that residence is the basis of the rule, it seems that the same result is reached. For it has been held that a city in several counties is a resident of that only which contains its principal offices. *Fostoria v. Fox*, 60 Oh. St. 340. In many jurisdictions a railroad is, indeed, subjected to suit as a resident in every county traversed. *Baldwin v. Mississippi, etc., R. R. Co.*, 5 Clarke (1a.) 518. *Contra, Thorn v. Central R. R. Co.*, 26 N. J. L. 121. But practical reasons of convenience would seem to make such cases distinguishable from the one under consideration. At any rate, as the New York Code defines a corporation's residence as its principal place of business, the result in the present case is inevitable.

MUNICIPAL CORPORATIONS — TERRITORIAL LIMITS AND SUBDIVISIONS — POWER OF LEGISLATURE TO ANNEX TERRITORY. — An act of the state legislature enlarged the limits of a city without the consent of the owners of the annexed territory, thereby subjecting the land to the burden of a previously incurred indebtedness. An owner sought to restrain the city from collecting taxes on the annexed territory. *Held*, that an injunction will not issue. *Lutterloh v. City of Fayetteville*, 62 S. E. 759 (N. C.).

The creation of municipal corporations or the extension of their boundaries is a legislative act, and, as such, is not subject to review by the courts unless some constitutional privilege is violated. *City of Galesburg v. Hawkinson*, 75 Ill. 152. When the power of taxation, usually delegated to the municipality, imposes a burden on land, which from its use or situation does not receive any benefit, some courts have intervened. Such taxation is held a deprivation of property without due process of law. *Vestal v. City of Little Rock*, 54 Ark. 321. And under territorial jurisdiction it is considered a taking of property for public use without just compensation. *People v. Daniels*, 6 Utah 288. But the weight of authority is against this view. *Bailey v. Manasquan*, 53 N. J. L. 162. Taxation is not confiscation, even though the burden is not generally uniform; and methods of taxation fixed by the legislature cannot be rearranged

by the courts. The liability of newly annexed territory for pre-existing indebtedness involves the same idea, and the annexing statute is not unconstitutional. *Hollis v. City of Rochester*, 41 N. Y. Misc. 559. However, the annexation of outlying lands for the sole purpose of taxation seems confiscation; accordingly, the annexation of non-contiguous land is generally held void. *Chicago & Northwestern R. R. Co. v. Town of Oconto*, 50 Wis. 189.

PATENTS — RECOVERY FOR INFRINGEMENT AFTER PATENT ANNULLED. — A patentee sued for infringement and obtained an injunction and a writ of inquiry as to damages. Then the defendant in a separate proceeding had the patent annulled. *Held*, that the defendant is estopped by the judgment in the first proceeding from denying at the inquiry the validity of the patent. *Poulton v. Adjustable Cover, etc., Co.*, 99 L. T. R. 647 (Eng., Ct. App., July 3, 1908).

It is doubtful whether the decree in the first proceeding is a final judgment. See *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 545. Even if it is final, yet the subsequent judgment revoking the patent creates an estoppel on an estoppel and therefore the question is left open. *Shaw v. Broadburt*, 129 N. Y. 114. In either case the doctrine of *res judicata* is inapplicable. But the result in the principal case may rest on another ground. A master cannot go behind the order under which the reference is made: he must accept it as conclusive of all matters embraced therein. See *Gilmore v. Gilmore*, 40 Me. 50. Where, as here, the sole question referred to the master is the amount of damages caused by the defendant's infringement, no issue is raised as to the validity of the patent. Evidence on that point is thus excluded at the inquiry, not because it is *res judicata* but because it is irrelevant. The intervening order of revocation is therefore improperly set up at the inquiry into damages. It is available, if at all, only in arresting the final judgment awarding damages.

PUBLIC SERVICE COMPANIES — RIGHTS AND DUTIES — RIGHT OF WITHDRAWAL FROM SERVICE. — Certain ferries were established by the city of New York pursuant to authority granted by charter and franchise. These ferry privileges were leased to a private corporation, whose sublessee threatened to discontinue the operation of the ferries. A citizen applied for a writ of mandamus against the city of New York. *Held*, that the acceptance of the franchises imposes a duty to continue in the operation of the service, the performance of which is enforceable by mandamus. *In the matter of Wheeler*, 40 N. Y. L. J. 1117 (Sup. Ct., Dec. 1908). See NOTES, p. 367.

RECEIVERS — RECEIVERS' CERTIFICATES — RIGHT TO ISSUE IN PRIVATE CORPORATIONS. — A receiver of an insolvent private corporation composed of eighteen mills applied to a court of equity for permission to issue certificates to provide a fund for the paying for the installment on the bonded indebtedness on one of the mills which was subject to immediate foreclosure in case of default; such certificates to become a lien on all the other mills prior to that of the subsisting mortgage. *Held*, that the certificates may be issued, on the ground that such a course is necessary for the preservation of the property. *Lockport Felt Co. v. United Box Board & Paper Co.*, 70 Atl. 980 (N. J. Eq.). See NOTES, p. 373.

SALES — CONDITIONAL SALES — BAILMENT WITH OPTION TO BUY DISTINGUISHED FROM CONDITIONAL SALE. — The owner of furniture let it on hire, the hirer paying a lump sum in consideration of an option to purchase, and agreeing to pay a monthly rent. By the agreement, the hirer could terminate the bailment by giving a week's notice and returning the goods. Should he avail himself of the option to buy, all payments for the option and for rent were to be credited on the purchase price. The hirer being in arrear with the rent, the owner retook the goods. *Held*, that the owner has not abandoned his right to sue for the arrears in rent. *Brooks v. Bernstein*, [1909] 1 K. B. 98.

Where the vendee under a contract of conditional sale defaults in payment,

the vendor may retake the property or sue for the price. These remedies are generally held to be mutually exclusive, it being argued that as the consideration for the vendee's promise to pay is the passing of the property, seizure thereof causes failure of consideration barring any action by the vendor for installments past due. *Hewison v. Ricketts*, 63 L. J. Q. B. 711. Cf. *Crompton v. Beach*, 62 Conn. 25. But see 20 HARV. L. REV. 371; *ibid.* 655. Where, however, the contract constitutes a bailment for hire with an option to purchase, as in the principal case, it cannot be urged that termination of the bailment takes away the consideration; for the hirer has had the use of the property as agreed. Though contracts of conditional sale are often drawn in terms of a lease, an agreement which is really a contract of sale will be so construed, irrespective of what the parties may have called it. *Hine v. Roberts*, 48 Conn. 267; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664. The test lies in the buyer's obligation. If he may avoid paying the amount of the purchase price by returning the chattel without liability for further rent, the contract is one of hire; for an agreement of sale and purchase necessitates two parties mutually bound, the one to pass and the other to take title. *Helby v. Matthews*, [1895] A. C. 471.

SALES — RIGHTS AND REMEDIES OF BUYERS — RIGHT OF INSPECTION BEFORE PAYMENT. — The plaintiff ordered from the defendant a quantity of groceries of a specified quality. He paid a part of the purchase price at the time of ordering and the balance was to be paid upon the arrival of the goods. The defendant shipped f. o. b. at the place of consignment on a bill of lading to the shipper's order. He notified the plaintiff that the goods were not of the required quality. The plaintiff refused to pay the draft sent with the bill of lading before inspecting the goods, and the defendant refused to allow inspection. The plaintiff brought an action to recover the part payment. *Held*, that the plaintiff may recover. *Plumb v. Bridge*, 113 N. Y. Supp. 92 (Sup. Ct., App. Div.).

The buyer under an executory contract of sale ordinarily has a right to inspect the goods before acceptance and payment of the purchase price. *Isherwood v. Whitmore*, 11 M. & W. 347. But the terms of the contract and the circumstances of the case may negative the right to inspection as a condition precedent to payment of the price. *Sawyer v. Dean*, 114 N. Y. 469. Thus, where payment is to be made against the bill of lading, the general rule is that payment must be made before the goods may be inspected. *Whitney v. McLean*, 4 N. Y. App. Div. 449. And the same is true in the case of a shipment C. O. D. *Wiltse v. Barnes*, 46 Ia. 210. See 18 HARV. L. REV. 386. But the decision in the principal case may be rested on another ground; for the admission by the defendant that the goods shipped were not of the required quality justified the plaintiff in refusing to accept them.

VENDOR AND PURCHASER — RIGHTS AND LIABILITIES — RIGHT OF VENDOR TO SUE FOR WASTE. — A contracted to sell land to B. Then B entered into a contract with C under which C cut timber on the land. Later B assigned to D. D paid A and brought suit against C in A's name. *Held*, that there can be no recovery. *McGregor v. Putney*, 71 Atl. 226 (N. H.).

A mortgagee may enjoy a mortgage in possession from committing waste if the threatened acts would make the value of the property inadequate as a security. *William v. Chicago Exhibition Co.*, 188 Ill. 19. And the acts need not be such as would make the value of the land less than the mortgage debt, but only such as would make the security substantially less than the security contracted for. *King v. Smith*, 2 Hare 239; *Moriarty v. Ashworth*, 43 Minn. 1. The relation of vendor and vendee is recognized as analogous and the same rules are applied. *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507. In most jurisdictions a mortgagee cannot recover at law unless his security is rendered actually inadequate, while in others any lessening of value is enough. *Schalk v. Kingsley*, 42 N. J. L. 32; *Byrom v. Chapin*, 113 Mass. 308. Where the vendor brings his action at law there seems no reason why the analogy to the mortgage cases should not continue. But as the basis of relief in all cases is impairment of the value of the security, neither vendor nor mortgagee can

sue after the debt has been paid. *Berthold v. Holman*, 12 Minn. 335; *Corbin v. Reed*, 43 Ia. 459. It is on this ground that the decision in the principal case is to be placed.

VESTED, CONTINGENT AND FUTURE INTERESTS — IMPLICATION OF TRUST TO PRESERVE CONTINGENT REMAINDER. — The testator devised property to his widow for life, and after her death to the children of his two sons. Of the two sons of the testator one died childless before the death of the mother, and the other had no children at the time of her death. *Held*, that the court will imply a trust and appoint trustees to preserve the contingent remainder. *Hayward v. Spaulding*, 71 Atl. 219 (N. H.).

A limitation will always be construed as a contingent remainder, if possible, instead of as an executory devise, even if the gift fails on such construction. *White v. Summers*, [1908] 2 Ch. 256. Where a remainder is limited to a person not in being or not yet ascertained, it is contingent. *Hopkins v. Keazer*, 89 Me. 347. And if a contingent remainder does not vest during the continuance of the particular estate or at the instant of its determination, the remainder fails. *Archer's Case*, 1 Co. 66 b. To prevent this the testator must expressly interpose an estate to trustees to preserve the contingent remainder. *Perceval v. Perceval*, L. R. 9 Eq. 386. A different rule seems to prevail in New Hampshire. There the courts will not apply the technical rules of contingent remainders to defeat the intention of the testator, and they will give effect to his intention, unless it is illegal or impossible, regardless of the particular form of words used. *Kennard v. Kennard*, 63 N. H. 303. Thus in the principal case the court implies a direction to trustees to preserve.

WAR — MILITARY PERSONS AS CONTRABAND OF WAR. — During the late Russo-Japanese war the plaintiffs reinsured a ship with the defendants and a clause of the policy warranted against "contraband of war." The ship, with two disguised Russian officers on board and bound for a Russian port, was captured and condemned by a Japanese prize court for carrying "contraband persons." The plaintiffs sued on the policy. *Held*, that the plaintiffs may recover. *Yangtze Ins. Ass'n v. Indemnity, etc., Assurance Co.*, 49 L. T. R. 498 (Eng., Ct. App., May 29, 1908).

For a discussion of this case in the lower court, see 21 HARV. L. REV. 636.

WILLS — CONSTRUCTION — IMPLIED CROSS LIMITATIONS. — A testator devised his property to trustees to pay the income to his daughters in equal shares, and in case any daughters should die leaving issue, then to such issue. The will further provided that from and after the death of the last surviving daughter and the majority of the testator's youngest grandchild the trustees should pay the corpus to the grandchildren in such shares as their mothers would have taken. One daughter died without issue. *Held*, that her share in the income goes to the surviving daughters and not to her representatives. *Macartney v. Macartney*, [1908] Vict. L. Rep. 649.

When there is a bequest to several as tenants in common with a gift over on the death of all, the disposition of the share of one who dies first depends on the construction of the will. Clearly the remainderman is not entitled; for the event on which he is to take — that is, the death of all — has not happened. *Scott v. Bargeman*, 2 P. Wms. 68. Nor should the testator's next of kin take; for a construction resulting in intestacy is to be avoided, even though a different construction results in making the disposition invalid as obnoxious to the rule against perpetuities. *Simpson v. Simpson*, 40 N. Y. L. J. 1203 (N. Y., App. Div., Dec. 1908). If the gift to the co-tenants is for life, the representatives of a deceased tenant cannot take, and hence a cross limitation will be implied. *Neighbour v. Thurlow*, 28 Beav. 33. But if there is an indefinite gift limited only by the gift over, then until the gift over takes effect the representatives of the deceased tenant are entitled. *Bignold v. Giles*, 4 Drewry 343. But this construction may be rebutted, as in the principal case,

if from the whole will it appears that the survivors were intended to take. *Armstrong v. Eldridge*, 3 Bro. Ch. 215.

WILLS — REVOCATION FOUNDED ON MISTAKE. — The testatrix destroyed her will on the supposition that she had made another valid will, but which was not, in fact, duly executed. The consent of the next of kin, who were all *sui juris*, having been obtained, application was made for probate of a copy of the destroyed will. *Held*, that the copy is entitled to probate. *Estate of Irvin*, 25 T. L. R. 41 (Eng., Prob. D., Nov. 2, 1908). See NOTES, p. 374.

WITNESSES — COMPELLING TESTIMONY — VEXATIOUS SERVICE OF SUBPŒNAS UPON MINISTERS OF THE CROWN. — Subpœnas were served on the Prime Minister and the Home Secretary, who made affidavits that they were unable to give any relevant testimony. The service had been obtained largely for vexatious purposes. *Held*, that the subpœnas should be set aside. *Rex v. Baines*, 25 T. L. R. 79 (Eng., K. B., Nov. 18, 1908). See NOTES, p. 376.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

- BASIS OF LAW, THE.** *John Mahon*. Discussing expediency as the basis of law. 42 Am. L. Rev. 872.
- CANCELLATION OF DEPOSITORY BONDS, THE.** *Luther E. Mackall*. Arguing against the power of surety companies to cancel such bonds. 42 Am. L. Rev. 820.
- CASE FOR LIMITATION OF ARMAMENTS, THE.** *Benjamin F. Trueblood*. Showing what advances have been made toward such limitation and pointing out the great expense of maintaining armaments. 2 Am. J. of Int. L. 758.
- CHANGE OF VENUE FOR CONVENIENCE OF WITNESSES — NECESSARY PROOF.** *Anon.* A summary of the law in New York. 15 Bench & Bar 94.
- CONSTITUTIONAL POWER TO PARDON CONTEMPTS OF COURT.** *Thomas J. Johnston*. Arguing that the executive never has such power. 12 L. N. (Northport) 185.
- CONSTITUTIONAL RIGHT TO A TRIAL BY A JURY OF THE VICINAGE, THE.** *Henry G. Connor*. 57 U. P. L. Rev. 197.
- DATE OF SEPARATION OF ECCLESIASTICAL AND LAY JURISDICTION IN ENGLAND, THE.** *Walter Lichtenstein*. Showing that the separation dates from the time of Stephen. 3 Ill. L. Rev. 347.
- EVOLUTION OF INTERNATIONAL LAW, THE.** *John W. Foster*. 18 Yale L. J. 149.
- FICTITIOUS PAYEES IN FORGED CHEQUES OR BILLS.** *Louis M. Greeley*. 3 Ill. L. Rev. 331.
- HISTORICAL DEVELOPMENT OF THE CONTRACT THEORY IN THE DARTMOUTH COLLEGE CASE.** *R. N. Denham, Jr.* 7 Mich. L. Rev. 201.
- INFLUENCE OF FRENCH LAW IN AMERICA, THE.** *Roscoe Pound*. 3 Ill. L. Rev. 354.
- INQUIRY INTO THE POWER OF CONGRESS TO REGULATE THE INTRA-STATE BUSINESS OF INTERSTATE RAILROADS, AN.** *David W. Fairleigh*. 9 Colum. L. Rev. 38.
- JURISDICTION OF THE ADMIRALTY IN CASES OF TORT.** *Henry Billings Brown*. Containing a history of the development of the law on the question and a statement of the present law. 9 Colum. L. Rev. 1.
- JURISTIC PERSON, THE. — I, II.** *George F. Deiser*. A philosophical treatment of the nature of a corporation. 57 U. P. L. Rev. 131, 216.
- LEGISLATIVE REFERENCE WORK AND THE LAW LIBRARY.** *C. B. Lester*. Emphasizing the need of methods which will make the finding of data on a subject more easy. 41 Chi. Leg. N. 183.
- MAY PROHIBITION LAWS AUTHORIZE THE TAKING OF PROPERTY WITHOUT COMPENSATION?** *O. H. Myrick*. Maintaining that compensation is necessary. 68 Cent. L. J. 2.
- NEW PENAL CODE OF SIAM, THE.** *Tokichi Masao*. 18 Yale L. J. 85.
- NOTICE TO, OR KNOWLEDGE OF, AN AGENT.** *Floyd R. Mechem*. An exhaustive treatment of the subject. 7 Mich. L. Rev. 113.
- OBLIGATORY ARBITRATION AND THE HAGUE CONFERENCES.** *Wm. I. Hull*. Explaining the different forms of arbitration treaties discussed at The Hague Conferences. 2 Am. J. of Int. L. 731.

- PROPOSED COURT OF ARBITRAL JUSTICE, THE. *James Brown Scott*. 2 Am. J. of Int. L. 772.
- RIGHT OF STOCKHOLDERS TO NEW STOCK, THE. *Frederick Dwight*. Arguing that the doctrine sustaining the right has been extended too far. 18 Yale L. J. 101.
- RIGHTS OF A TRAVELER TO USE HERE ARTICLES MADE AND PURCHASED ABROAD BUT PATENTED HERE. *Dwight B. Cheever*. 7 Mich. L. Rev. 226.
- SOME ASPECTS OF BUSINESS BY TELEGRAM. *W. F. Chipman*. Dealing with creation of contract relations by telegram. 28 Can. L. T. & Rev. 817.
- SOME HISTORICAL MATTER CONCERNING LITERARY PROPERTY. *Edward S. Rogers*. 7 Mich. L. Rev. 101.

II. BOOK REVIEWS.

HISTORY OF THE ROMAN-DUTCH LAW. By J. W. Wessels. Grahamstown, Cape Colony: African Book Company, Limited. 1908. pp. xv, 791. 8vo.

The prevalence of Roman law in South Africa furnishes a curious and striking illustration of the far-reaching influence of ancient Rome. The law of Holland, then in large measure Roman, was carried to the Cape of Good Hope by the colonists of the seventeenth century and established itself so firmly that it continued in force after the English conquest and was in course of time officially adopted in Natal, the Transvaal, the Orange Free State, and Southern Rhodesia. As Holland had no code in the period before the loss of its African colonies, the law had for the most part to be sought in the writings of the great Dutch jurists of the seventeenth and eighteenth centuries; but in case of doubt the *Corpus Juris Civilis* was the ultimate resort, and as recently as 1901 an appeal from Natal to the Judicial Committee of the Privy Council involved the interpretation of a passage in the *Digest*. But while a certain amount of continuity is thus preserved, the Roman-Dutch law is in an isolated position. It is no longer a living force in Holland, where the new code came into force a century ago, so that it lacks such external support as the civil law in Quebec receives from France, and the forces of legal development inevitably favor English law. Not only has the English law of evidence been introduced, but the influence of English decisions, imperial legislation, and barristers with an English training, works strongly against the Dutch tradition. In many respects this state of affairs has tended to produce confusion, and Judge Wessels complains of "the heterogeneous mass of legal systems" now prevalent in South Africa and pleads for a more scientific adjustment of conflicting principles.

A body of law fed from such streams has naturally an interesting history, some knowledge of which would seem essential to a thorough understanding of present conditions, and Judge Wessels tells us that it was the general ignorance of such matters on the part of practitioners that led him to write the articles for the *South African Law Journal* which have grown into the present volume. The work falls into two parts, one dealing with the general development of Roman-Dutch law, the other treating historically the more significant topics. Such a book cannot, especially for the earlier period, be expected to rest in any considerable degree upon original investigation, and while some use has been made of modern manuals such as those of Brunner and Schröder, too much reliance is placed upon older Dutch and Belgian writers, so that many of the statements respecting the law of the Middle Ages are open to serious question. The treatment is often scrappy and does not always bring out sufficiently the most significant points. The modern portions are better, and the task as a whole was worth attempting, even if it could not be carried out with the full equipment of the scientific student of historical jurisprudence. The book should teach the lawyers of South Africa some valuable lessons concerning the long and honorable history of their legal system.

C. H. H.

THE LAWS OF WAR ON LAND (WRITTEN AND UNWRITTEN). By Thomas Erskine Holland. Oxford: At the Clarendon Press. 1908. pp. viii, 149. 8vo.

The principal written laws affecting the conduct of war on land may be found in the proceedings of international conferences at St. Petersburg in 1868, at

Geneva in 1906, and at The Hague in 1899 and 1907. These rules, with a few significant but relatively unimportant exceptions, have been accepted by the great majority of civilized nations and, supplemented where necessary by the general principles of international law, furnish material for a complete code. For this purpose these written rules or acts of the conferences are particularly adaptable, as they have uniformly been drawn in terse, concise language and framed in numbered paragraphs or articles. To assemble such a code has been the aim of the author.

The code as drawn consists of one hundred and thirty-nine articles. The first fifteen are all rules of the author gathered under the title of "General Principles." The fact that only ten others are drawn by the author is evidence of the completeness of the work of these conferences.

The Hague Convention No. iv of 1907 "Respecting the Laws and Customs of War on Land," together with the *Règlement* or Regulations annexed to it, forms the backbone of the author's code. To it is prefixed The Hague Convention No. iii of 1907 "Relative to the Commencement of Hostilities," and affixed, The Hague Convention No. v of 1907 "Concerning the Rights and Duties of Neutral Powers and Individuals in Case of a War on Land." The Convention of Geneva of 1906 "For the Improvement of the Condition of the Wounded and Sick in Armies in the Field," the St. Petersburg Declaration of 1868 and the three Hague Declarations, one of 1907 and two of 1899, are inserted at the logical places among the articles taken from The Hague Regulations of 1907.

While the author's articles are not unimportant, the value of the book lies, as will have been seen from the above statement, largely in the coördination of these various detached diplomatic acts. There is, however, an additional feature which must not be disregarded. To by far the greater part of these articles the author has subjoined comments of his own. These are, it is true, for the most part explanatory or merely by way of reference, but there are not a few which are critical in their nature. Nor should mention be omitted of the various appendices, containing brief historical notes as to the diplomatic acts which form the body of the work, together with their texts and lists of powers which became parties to them.

Excellent mechanically, the volume is very compact in substance, and its inclusiveness coupled with its brevity will make it a very convenient manual. The author's name vouches for its reliability.

A. R. G.

A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE. By Charles C. Moore. In two volumes. Northport, Long Island: Edward Thompson Company. 1908. pp. clxviii, 73; 730-1612. 8vo.

The successful treatment of the subject "Facts" is peculiarly difficult. It is not only the infinite variety of the forms that facts assume and the vast number of the laws governing things that imperil success. The common opinion that after a moderate experience the average mind is able to deal justly with even the most complex facts is a considerable barrier to the production of a profound treatise on "Facts." It is therefore a matter of congratulation when this comparatively little trodden path is widened and straightened.

The express design of Mr. Moore's treatise is "to facilitate the preparation for trial, the argument, and the decision of questions of fact, by exhibiting what has been said by United States, Canadian, and English judges concerning the causes of trustworthiness and untrustworthiness of evidence, and the rules for determining its probative weight."

This treatise divides into two parts, that containing various bits of information that have proved and may prove useful in the trial of cases; and that concerned with the rules of law more especially applicable to the judgment of facts.

The first division is the more useful and by far the more interesting. For instance, it is the rare lawyer who knows that although a person in the open can tell whether a sound comes from the right hand or the left, he may not be able to tell whether it comes from in front or behind; and yet how valuable would such a bit of information prove in the cross-examination of a witness as to the

position of a sound when the direction of the sound was material. That the author has not discussed such kinds of information more fully and has not delved more deeply into the discoveries of the scientists and particularly the psychologists is regrettable.

The chapters upon "Uncontradicted Evidence," "Degree of Proof," and similar matters contain no new contributions to the already considerable supply of such literature. The material is poorly arranged. The treatment is encyclopedic — that is to say, there is not a comprehensive consideration of the principles marked out by the precedents. The author has also failed to use the knife to good purpose. Much material should have been omitted and many sections consolidated and shortened. It was hardly necessary, for instance, to include in three separate paragraphs the subjects "Surmising Negligence in Admiralty Cases," "Guessing concerning Contributory Negligence," and "Conjecture in Accident Insurance Cases."

F. W. B.

THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATIONS TO CRIMINAL PROCEDURE. By Maurice Parmelee. New York: The Macmillan Company. 1908. pp. viii, 410. 12mo.

This is a much needed book in this country, where so little attention has been given to scientific criminology. Penology, on the other hand, which deals with the criminal after he has been convicted and sentenced, has received more attention here than elsewhere. The whole question of dealing with the criminal prior to his sentence has been, in this country where the legal incubus is so far developed, assumed to belong exclusively to the lawyer, and the lawyer has cared notoriously little for science and scientific methods.

The science of criminology the author divides into two branches, criminal anthropology and criminal sociology, the former dealing with the characteristics of the criminal man, and the latter with the social causes of crime. The problem which he sets before himself is that of the readjustment of the principles of criminal procedure so that the data of criminology can be utilized in the treatment of criminals. Criminal procedure is not conceived as a purely legal process, but as a process by which the class called criminal is separated from the rest of society.

Chapters I and II are historical, dealing with the development of the science of criminology, mainly in Italy, where it has received more attention than elsewhere, beginning with the "Crimes and Punishments" of Cesare Beccaria in 1764. Chapter VI is devoted to a discussion of systems of criminal procedure, and the subsequent chapters are given up to a more constructive development of the author's own views.

One of the main generalizations is that procedure should be devoted more toward the finding out of the nature of the criminal, on the ground that punishment should be adjusted to the nature of the criminal rather than to the nature of the crime. Of course the nature of the crime is one, but only one, index of the nature of the criminal, and other indices should be used. The work is, throughout, scholarly and moderate in tone, though proposing positive, not to say drastic, reforms. The only serious lapse in the author's scholarly treatment is, in the opinion of the reviewer, on page 98, where he refers to heredity as the "cumulative result of social environment in the past." This is a position which few students of heredity now maintain.

T. N. C.

THE LAW OF REAL PROPERTY. By Raleigh Coltson Minor. In two volumes. University of Virginia: Anderson Brothers. 1908. pp. vi, 1038; 1038-1825. 8vo.

EFFECTS OF WAR ON PROPERTY. By Almá Latifi. With a note on BELLIGERENT RIGHTS AT SEA. By John Westlake. New York: The Macmillan Company. 1909. pp. x, 155. 8vo.

HANDBOOK OF AMERICAN MINING LAW. By George P. Costigan, Jr. Hornbook Series. St. Paul: West Publishing Company. 1908. pp. xiv, 765. 8vo.

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SOME JUDICIAL MYTHS.

THE myths which are to be dealt with in this article do not come within the definition, "A tale handed down from primitive times, and in form historical, but in reality involving elements of early religious views."¹ Rather are they to be classed with what a learned writer² has styled Myths of Observation. These, Mr. Tyler assures us, "are inferences from observed facts, which take the form of positive assertions," "which seemed indeed probable when the myths arose, but which modern knowledge repudiates." At the root of these myths lies the easy transition from "it might have been" to "it was." In illustration of this myth-making tendency of the human mind, our author writes: "To men whose country has the open sea to its west it seems that the sun plunges at night into the waters. Now the sun is evidently a mass of matter at a distance, and very hot, and when red-hot bodies come in contact with water there follows a hissing noise: and thus the inference is easy and straightforward that when the sun dips into the waves such sound ought to be heard. From the inference that the hissing might be heard, is the easy step by which the crude argument of early science passes into the full grown Myth of Observation."

One of the judicial myths which would seem to fall within the class described above appears in a decision of the New York Court of Appeals. The case involved the construction of the Factors Act of New York. Said the court:³ "Statutes similar to this have for

¹ The Century Dictionary.

² Tyler, *Early History of Mankind*, ch. XI.

³ *Soltau v. Gerdaui*, 119 N. Y. 380, 390, 23 N. E. 864 (1890).

many years existed in most if not all the states of the Union, and it has never yet been held, nor, so far as we can discover, claimed in any reported case, that the Factors Act can have any operation whatever in the case of goods taken by a common-law larceny from the true owner." Undoubtedly, the court gave the proper construction to the statute, but the positive assertion that statutes similar to the one under consideration had for many years existed in many if not all the states of the Union was a sheer myth. They existed in less than a half-score of the states. The learned judge who wrote the opinion of the court had observed the existence of the Factors Act in New York and a few neighboring states. To him the inference of its wide-spread existence seemed probable, and the transition was easy from "it might have been" to "it was."

Two examples of the myths under consideration may be found in a recent article from the pen of a learned judge.¹ The article contains an admirable discussion of certain provisions of the Bankruptcy Act of 1898 and of numerous decisions upon them. Even the myths which we are about to point out should not detract from the real merit of the article, but should be ascribed to what Mr. Tyler calls the myth-making tendency of the human mind.

The first myth is contained in the following extract: "It is often interesting to note the origin of phrases which are the small change of literature, and 'partnership entity' is now a legal commonplace. For it the profession seems to be indebted to Judge Thomas of the Eastern District of New York, and Mr. Lowell, whose work on bankruptcy was published in 1899."

No one will question that "partnership entity" is a commonplace phrase at the present time; and there may be many members of the bar who have no recollection of its use prior to 1899. To them the inference of the learned judge would seem warranted, that the legal profession is indebted for the phrase to a decision rendered in that year of grace. But a fuller knowledge of the history of the phrase repudiates the inference.

Six years before Judge Thomas' decision,² partnership had been defined, in a standard treatise on that subject, as "a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between

¹ "Some New Aspects of Partnership Bankruptcy under the Act of 1898," 8 Colum. L. Rev. 599-604.

² *Chemical Nat. Bank v. Meyer*, 92 Fed. 896 (1899).

them.”¹ The editor made no claim to originality in the use of the phrase under consideration. On the other hand, he cited abundant judicial authority for its employment. It may be of interest to quote from these sources, and others, to show that the phrase was well known, if not commonplace, when Judge Thomas repeated it in 1899.

The Supreme Court of Alabama had said: “A partnership, in contemplation of law, is an entity distinct from the members who compose it.”² About the same time the Supreme Court of Mississippi declared: “In equity a partnership is for some purposes deemed a single entity.”³ Similar language has been used by the New York Court of Appeals repeatedly, of which the following is a fair sample: “In this action we are concerned only with the character which the law ascribes to partnership property while in the hands of the firm as a legal entity.”⁴ Chief Justice Bleckley, writing for the Supreme Court of Georgia, expressed its conception of a partnership in these words: “The law does take note on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and of obligations.”⁵ The Supreme Court of Nebraska announced many years ago that “A partnership is a distinct entity, having its own property, debts and credits. For the purpose for which it was created, it is a person, and as such is recognized by the law.”⁶ The doctrine has been reaffirmed in later cases.⁷ It has found expression, too, in the decisions of the Michigan Supreme Court, as shown by the following extracts: “For many purposes a firm, though managed necessarily by its members, is a distinct concern and possesses a sort of individuality.”⁸ Again: “The partnership for most legal purposes is a distinct

¹ Parsons, Partnership, 4 ed., 1. The editor, Professor Beale, insists in his Preface that the mercantile conception of a partnership had then become the legal conception also; and declares “that great acknowledgment is due to Professor J. B. Ames, to whom more than anyone in this country we owe the acceptance of the doctrine.”

² Teague v. Lindsey, 106 Ala. 266, 17 So. 538 (1895).

³ Jackson Bank v. Durfey, 72 Miss. 971, 18 So. 456 (1895), adopting the language of Arnold v. Hagerman, 45 N. J. Eq. 186, 197 (1888).

⁴ Greenwood v. Marvin, 111 N. Y. 423, 437, 19 N. E. 228 (1888). See Menagh v. Whitwell, 52 N. Y. 146 (1873); Bulger v. Rosa, 119 N. Y. 459, 465, 24 N. E. 853 (1890); Peyser v. Myers, 135 N. Y. 599, 604, 32 N. E. 699 (1892).

⁵ Drucker v. Wellhouse, 82 Ga. 129, 132 (1888). In Ransom v. Wardlaw & Co., 99 Ga. 540, 27 S. E. 158 (1896), this court held that a firm may be insolvent, although the partners, as individuals, may be perfectly solvent.

⁶ Roop v. Herron, 15 Neb. 73, 80 (1883).

⁷ Richards v. Le Vielle, 44 Neb. 38, 62 N. W. 304 (1895).

⁸ Hubbardston Lumber Co. v. Covert, 35 Mich. 254, 260 (1877).

entity;—having its own property, capable of contracting its own debts, having the right to sue in equity its several members, and to be protected against their conduct to the extent that it might be against the conduct of strangers.”¹ The Supreme Court of Vermont had no hesitation in declaring: “A partnership or joint stock company is just as distinct and palpable an entity in the idea of the law,* as distinguished from the individuals composing it, as is a corporation.”² As early as 1839 President Tucker said, on behalf of the Court of Appeals of Virginia, that a partnership is to be “considered as a separate and distinct person, invested with rights separate and distinct from each of the partners.”³ Some years earlier, Chief Justice Hornblower, with the approval of the Supreme Court of New Jersey, declared: “In the case of partnerships, the firm is the contracting party . . . the partnership the ideal person, formed by the union of interests, is the legal debtor. A partnership is considered in law as an artificial person or being, distinct from the individuals composing it. It is treated as such in law and in equity.”⁴ Earlier still, the Supreme Court of New York had laid it down as unquestioned, that the members of a firm “constitute but one person in law.”⁵

The second myth in the article referred to is that “the Meyer case opened the discussion of a wholly novel question, namely, whether the Bankruptcy Act of 1898” “made out of an association of partners an entirely new, separate, and distinct ‘person,’ *i. e.*, the partnership entity.” In support of this statement the learned judge refers to the absence of any reference to section five in the discussions of the present Bankruptcy Act, prior to its passage, and the lack of any “evidence that the framers of the Act attached any importance to the form of words they used.”

It may be true that those members of the legal profession, who had never heard that a partnership had been treated by the law as an entity, attached no importance to the language, in sections one, three, and five, which clearly declared “partnerships” to be “persons,” and gave unequivocal expression to the doctrine of partnership entity. However that may have been, the language was deemed very important by those who were familiar with the

¹ *Robertson v. Corsett*, 39 Mich. 777, 784 (1878).

² *Walker v. Wait*, 50 Vt. 668, 676 (1878).

³ *Pierce's Adm'r v. Trigg's Heir*, 10 Leigh (37 Va.) 406, 423 (1839).

⁴ *Curtis v. Hollingshead*, 2 Green (14 N. J. L.) 402, 409 (1834).

⁵ *Warner v. Griswold*, 8 Wend. (N. Y.) 665, 666 (1832).

doctrine. Long before the Meyer case came before Judge Thomas, the sections of the Bankruptcy Act, above mentioned, were the subject of frequent discussion by persons engaged in teaching the subject of partnership. So far as the present writer's memory serves him, the opinion of those persons was unanimous that those sections gave full effect to the partnership entity doctrine. His own view, which was committed to writing in the summer and fall of 1898, was stated as follows: "The doctrine (that a partnership is an entity distinct from the individuals composing it) has received legislative approval in the United States Bankruptcy Law of 1898. . . . In a jurisdiction where a partnership is treated as an entity, the firm may be proceeded against as an insolvent person, although one or more of its members may be able to pay his or their individual debts as well as the firm debts in full. . . . This statute declares that 'a partnership . . . may be adjudged a bankrupt'; that a person who suffers or permits, 'while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference,' commits an act of bankruptcy; that the word 'persons' shall include . . . 'partnerships'; that 'it shall be a complete defense to any proceedings in bankruptcy . . . to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of filing the petition against him, and if solvency at such date is proved, by the alleged bankrupt, the proceedings shall be dismissed'; and that a person is deemed insolvent 'whenever the aggregate of his property, exclusive of any property which may have been conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.'" ¹

A very interesting judicial myth in this country is connected with the English doctrine of out and out conversion into personalty of partnership real estate. It is especially noteworthy, not only because it has been repeated frequently by judges in widely separated jurisdictions, but because it illustrates the easy transition from "it might have been" of one court to "it was" of another.

The fullest statement of the myth is to be found in a North Carolina decision, and is as follows: "The idea that land shall

¹ Burdick, *Partnership*, 1 ed., 287, 291, quoting from §§ 1a, 15, 19, 3a, 5a, 4, of the Bankruptcy Act of 1898.

be considered and treated as personal property is not readily comprehended by a plain mind, and requires explanation. It is an artificial and refined doctrine, adopted by the Chancellors in England in reference to copartnerships, on the principle of giving effect to the agreement of the copartners, and originated in this wise: By the common law, on feudal reasons, land could not be sold for the payment of debts. By virtue of legislative enactments, the writ of *elegit*, and statutes merchant and staple, subjected land to the claims of creditors in a modified way; that is, by giving the creditor the right to have the land extended at a yearly value, and to have an estate and to receive the rents and profits, until, at the extended value, the debt was satisfied. This, however, did not cause land to answer the purpose of trade and become the means of extended credit, as fully as if it could be sold out and out like personal property. Again, land held by joint tenancy was subject to the doctrine of survivorship, by which, on the death of either tenant, the whole estate belonged absolutely to the surviving tenant. This was a great drawback to the formation of copartnerships in which the business made it necessary for the firm to own land. To obviate these difficulties, the articles of copartnership in many instances contained the agreement that the land required and owned as part of the stock in trade should be considered as personality: and, in others, the acts of the parties furnished ground for the inference that it was the intention to impress on land the character of personality in all such cases; and the Courts inclined to extend them by construction and implication."¹

This statement has been accepted by the Kentucky Court of Appeals.² In other jurisdictions it has been supplemented to some extent by the affirmation that the tendency of the English courts to treat partnership real estate as converted out and out into personality is due to their desire "to avoid the injustice of the English Canon of Descent of real estate to the eldest son."³

¹ Summey v. Patton, Winst. Eq. 52 (60 N. C. 60r), 86 Am. Dec. 451 (1864).

² Carter v. Flexner, 92 Ky. 400, 407 (1891).

³ Craighead v. Pike, 58 N. J. Eq. 5, 43 At 424 (1899). The earliest suggestion of this branch of the myth which has fallen under the writer's notice is found in Markham v. Merrett, 7 How. (8 Miss.) 437, 445 (1843), in these words: "One reason which induced the [English] Courts to favor a change of the rule was, that it was unjust to prefer the rights of the heir at law, when the whole family may have been induced to look to it and to consider it as a common fund for the benefit of all, when the firm should be dissolved. This reason could have no weight here, the right of primogeniture being abolished." This case is the only authority cited in Parsons on Partnership in support

The myth, as thus supplemented, has been summarized as follows, in a decision of the New York Court of Appeals: "This doctrine [of out and out conversion] had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance; and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor."¹

Two cases are cited for this assertion, but in neither of them had the myth progressed beyond the stage of "it might have been." The language in the Massachusetts case is this: "The inheritance being exempt from liability for debts by simple contract, it is only by conversion and payment of the proceeds to the personal representative of a deceased partner, that his private creditors can receive payment out of such property. How far, if at all, this consideration may have been influential in determining the extent to which the doctrine of equitable conversion should be carried, and in establishing the right of the personal representative to require it to be made in his favor, we are unable to judge."² In the other case cited, the court said: "The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons; and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir, probably on account of the great injustice which would result by the law of inheritance in England."³ In support of this probability (and it will be observed that the myth has not yet developed into a positive assertion⁴), the court cites *Collumb v. Read*,⁵ which contains no intimation of this doctrine, and *Parsons on Partnership*,⁶ where the myth is set forth *in extenso*. It is quite remarkable that the learned author does not refer to a single English decision or writer in support of the reasons which he assigned for the English rule.⁷

of that author's repetition of this reason for the English rule. See 4th ed., § 271, note (y).

¹ *Darrow v. Calkins*, 154 N. Y. 503, 513, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637 (1897).

² *Shearer v. Shearer*, 98 Mass. 107, 114 (1867).

³ *Fairchild v. Fairchild*, 64 N. Y. 471, 478 (1876).

⁴ See *Aldrich v. Robinson*, 2 Haw. 606, 608, 613 (1862), for a similar supposititious statement.

⁵ 24 N. Y. 505 (1862).

⁶ 3 ed., 370. The same paragraph appears in the fourth edition as § 271.

⁷ The only authority cited is *Markham v. Merrett*, 7 How. (8 Miss.) 437, 445 (1843), referred to in a former note.

A very careful study by the present writer of every English case connected with this topic, as well as of English text books, has failed to disclose even a hint of either of the reasons assigned by this myth for the English rule. On the other hand, there seems no ground for doubt that, prior to 1791, the English bench and bar entertained the view "that lands purchased for the purpose of a partnership concern were in all respects a portion of the partnership fund, and were therefore distributable as personal property."¹ This view was based not on the difficulty of subjecting lands to the lien of an execution, nor on the injustice of primogeniture as a canon of descent, but on "the principle that all the property of a partnership, whether real or personal, is subject to a sale on dissolution of the partnership."² Such a sale is necessary to a partnership accounting and distribution of assets.³

The principle underlying the English rule of out and out conversion has been stated as follows by Lord Lindley: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows, that, in equity, a share in a partnership, whether its property consists in land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the two parties."⁴ It will be observed that there is no trace of the mythical reasons here.

Undoubtedly, Lord Thurlow laid down a different rule in *Thorn-ton v. Dixon*,⁵ although, when the case was first brought before him, he is reported to have said that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund, and consequently to be considered as personal estate. Later, he held that, in order to convert such lands into personalty, there must be an agreement between the partners that they must be valued and sold, and that such agreement had not been made in the case before him. The neces-

¹ Watson, *Partnership*, 2 ed., 81 (1 Am. ed., 60); 1 Montague, *Partnership*, 2 ed., 139; Lord Eldon in *Kirkpatrick v. Sime*, 5 Paton Sc. App. 525, 535-6 (1811).

² *Fereday v. Wightwick*, 1 R. & M. 45, 49, Taml. 250, 33 R. R. 136 (1829).

³ *Darby v. Darby*, 3 Drew. 495, 25 L. J. Ch. 371, 2 Jur. N.S. 271, 4 W. R. 413 (1856).

⁴ Lindley, *Partnership*, 7 ed., 381.

⁵ 3 Bro. Ch. 199 (1791).

sity for such special agreement was denied by Lord Eldon¹ as well as by other eminent judges;² and was repudiated by Parliament.³

Closely associated with the mythical reasons for the English rule, which we have been considering, is the equally mythical claim for the superiority of the American rule on this topic. In the learned opinion, already cited, that rule is stated as follows:

"In the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves, and also between the surviving partner and the real and personal representative of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes, the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected."⁴

The rule thus set forth, we are assured in the same opinion, "commends itself for its simplicity":⁵ and herein lies the myth. Place alongside the above statement the English rule as formulated in the Partnership Act of 1890:

"Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased

¹ *Selkirk v. Davies*, 2 Dow. 230, 242 (1814); *Crawshay v. Maule*, 1 Sw. 495, 526, 1 Wils. Ch. 181, 18 R. R. 126 (1818); *Townsend v. Devaynes*, *Montague, Partnership*, Appendix, 96, 11 Sim. 498 note (1811).

² *Phillips v. Phillips*, 1 My. & K. 649, 1 L. J. Ch. N. S. 214, 36 R. R. 410 (1832); *Broom v. Broom*, 3 My. & K. 443 (1834); *Darby v. Darby*, 3 Drew. 495 (1856); *Waterer v. Waterer*, 15 Eq. 402, 21 W. R. 506 (1873); *Holroyd v. Holroyd*, 7 W. R. 426, 28 L. J. Ch. 902 (1859); *Murtagh v. Costello*, L. R. 7 Ir. 428 (1881).

³ Partnership Act 1890 (53 & 54 Vict. c. 39), § 22.

⁴ *Darrow v. Calkins*, 154 N. Y. 503, 514 (1897).

⁵ *Ibid.*, 515.

partner and his executors or administrators, as personal or movable and not as heritable estate." ¹

Upon the face of those two rules, which one commends itself "for its simplicity"? Is it not the English rather than the American rule? If we go beyond the impressions produced by the mere statement, and examine the practical working of these rules, it becomes perfectly clear that the American rule results in all sorts of complications and confusion. Has the wife of a partner an inchoate dower interest in firm real estate? Can the surviving partner transfer either a legal or an equitable title to such real estate? Does he become a tenant in common with the heirs of the deceased partner? Is an action for partition maintainable between them? Is the real estate of a firm converted into personalty while it is in business? If it is, at what moment is it reconverted into realty? These are but a few of the many questions to which our "commendably simple" American rule has given rise, and to which our courts have given an astonishing variety of answers. If any one longs for a good example of the judicial confusion which this rule breeds, let him examine with some care a recent Arkansas decision.² It is submitted that no one can study the immense volume of litigation to which our doctrine of partial conversion has given rise without realizing that it is a perfect Pandora's box of invitations to lawsuits.

The myth of its "commendable simplicity" seems to be attributable to the prepossession of our judges in favor of a rule because it is *our* rule. It results from the same tendency of the human mind which led Lord Coke to indulge in the myth that English merchants had been models of thrift, fair dealing, and conscientious economy, until they fell from this Edenic estate through the temptations of wicked foreigners;³ and which begot in Blackstone such an unquestioning faith in the perfection of the English common law as enabled him to dress up its most defective parts in a garb of charming fiction and throw over them a bewitching light.

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¹ § 22.

² *French v. Vanatta*, 83 Ark. 306, 104 S. W. 141 (1907), and comments thereon, 8 Colum. L. Rev. 208-211. Cf. *Aldrich v. Robinson*, 2 Haw. 606, 615 (1862).

³ Co. Inst. 4, 277.

A NEW DEVELOPMENT IN THE APPLICATION OF EXTRA-TERRITORIAL LAW TO EXTRA-TERRITORIAL MARINE TORTS.

THE Supreme Court of the United States decided at its October Term, 1907, two significant cases of collision on the high seas. These decisions are another step in the application of extra-territorial law to extra-territorial marine torts. They were the case of the American steamer "The Hamilton,"¹ in collision with another American ship, seven miles off the coast of Virginia, and the case of the French steamer "La Bourgogne,"² sunk by a British ship sixty miles off Sable Island.

An accurate comprehension of these decisions involves a brief consideration of the structure of the government of the United States and the relation existing between it and the governments of the component states, and also a consideration of the jurisdiction of the American courts of admiralty.

The colonies which declared their independence of England became independent sovereign states, uniting for national purposes as the United States of America under a written constitution. There is no loss of separate and independent autonomy to the states through their union under this Constitution, which in all its provisions looks to an indestructible union composed of indestructible states.³ The federal government possesses only the powers delegated to it by this Constitution, but while its functions are circumscribed, it is sovereign and supreme in the exercise of those functions.⁴ The powers which the Constitution has not delegated to the general government nor prohibited to the states are reserved by the Constitution to the individual states or to the people themselves.⁵

Hence the states are, for national purposes, united under one central authority, but outside of the realm of nationality they are

¹ 207 U. S. 398 (Dec. 23, 1907).

² 210 U. S. 95 (May 18, 1908).

³ *Texas v. White*, 7 Wall. (U. S.) 700 (1869).

⁴ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819).

⁵ U. S. Const., X Amendment.

as foreign to each other and as independent as if they had never entered into the federal compact.¹ It is this duality of sovereignty which has led to the embarrassment hereinafter mentioned.

Americans bear, then, a double allegiance: first, to the United States, and, secondly, to the particular state of their citizenship.² Each state ordains its own courts, but the judicial power of the United States is vested in one Supreme Court and in the inferior courts ordained by the Congress or National Legislature.³ The national courts are known as the District Courts, the Circuit Courts, the Circuit Courts of Appeals, and the Supreme Court. The judges of all these courts are called Federal Judges. The power of the national tribunals is expressly extended by the fundamental law itself to "all cases of admiralty and maritime jurisdiction."⁴ In other words, the national or federal courts as contradistinguished from those established by the individual states, have exclusive as well as original jurisdiction of all actions or proceedings in admiralty. Thus a state court could not take cognizance of a legal proceeding *in rem* for a collision between vessels while navigating the high seas or the inland waters of the continent, since such a proceeding is in admiralty and not at common law.⁵ The particular domain of jurisdiction which we are considering belongs by constitutional grant to the courts of the nation alone. The framers of the Constitution sought in this way to attain uniformity and consistency in all maritime transactions between citizens of the several states of the Union or between citizens of any state and those of the lands beyond seas.⁶

Sir Edward Coke, appointed Chief Justice of England by the successor of Queen Elizabeth, so revered this ancient common law (*das Volksrecht, la loi commune*) that he defended it against both the Court of Chancery and the Ecclesiastical Courts, and like King Canute, hopelessly forbidding the advance of the rising tide, he combated ferociously⁷ every attempt to expand the admiralty jurisdiction. Its expansion signified to him an intrusion upon the high

¹ *Buckner v. Finley*, 2 Pet. (U. S.) 586 (1829); *SeEVERS v. Clement*, 28 Md. 426 (1868).

² U. S. Const., XIV Amendment.

³ U. S. Const., Art. III, § 1.

⁴ U. S. Const., Art. III, § 2.

⁵ *The Hine v. Trevor*, 4 Wall. (U. S.) 555 (1866).

⁶ *The Lottawanna*, 21 Wall. (U. S.) 558 (1875); *Butler v. Boston & Savannah S. S. Co.*, 130 U. S. 527 (1889).

⁷ *Smart v. Wolf*, 3 T. R. 323 (1789).

prerogative of the courts of the common law.¹ The Virgin Queen was the first to foresee the splendid possibilities of Britain's maritime power.² The reactionary tendencies set in motion by Lord Coke after her death necessarily resulted in a narrowing of the admiralty jurisdiction, which did not comport with the expanding commerce of the kingdom. The last effects of the bickerings and disputes between the advocates of the respective courts of judicature were not entirely eliminated until three centuries later, when Parliament enacted laws placing the English admiralty on its modern basis, restoring in part its ancient jurisdiction.³

America claims the common law of England as a proud heritage, and sacredly preserves its beneficent trial by jury as a guaranty of individual liberty.⁴ But the restrictions of English common law courts upon the admiralty never applied to the colonies. Under commissions from the mother country, the admiralty jurisdiction was of the most extensive and beneficial character.⁵

And this jurisdiction as granted by the Constitution to the Federal Courts was, says Mr. Justice Story, "the jurisdiction which, collecting the wisdom of the civil law and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind."⁶

Still, early American lawyers and judges, trained in the common law traditions, inherited a prejudice against a maritime court without a jury, and a predilection for a narrow field of juridical power in the admiralty.⁷ America, by the grace of her freer colonial practice, the necessities of her situation, and the accelerated movement of modern thought, soon established her admiralty law more nearly in accordance with that of other maritime nations.⁸

A distinguished French commentator said that "The worst maritime code would be one which should be dictated by the separate interests and influenced by the peculiar manners of only one people."⁹

¹ Benedict, Admiralty, § 6.

² Hughes, Admiralty, 3, 4.

³ 3 & 4 Vict. c. 65 (1840); 9 & 10 Vict. c. 99 (1846); 17 & 18 Vict. c. 104 (1854); 24 & 25 Vict. c. 10 (1861); 31 & 32 Vict. c. 71; (1868).

⁴ U. S. Const., VII Amendment; Maryland Declaration of Rights, Art. V.

⁵ Benedict, Admiralty, § 114.

⁶ *De Lovio v. Boit*, 2 Gall. (U. S.) 398-472 (1815).

⁷ Benedict, Admiralty, § 7.

⁸ Benedict, Admiralty, § 7; Hughes, Admiralty, 4.

⁹ Jean Marie Pardessus (1772-1853).

It is a source of pride to American lawyers that the general maritime law of the world is, with slight modifications, the settled law of the United States. This law is, of course, subject to change by the national legislature, for the system is not statical, but progressive.¹

An illustration of its flexibility is found in the rule of locality as determinative of jurisdiction. The English courts of common law had established the ebbing and flowing of the tide as the boundary of the admiralty's juridical power.² It was in consequence of British precedents that the Supreme Court of the United States solemnly declared eighty years ago that the American courts of admiralty had no jurisdiction whatever over contracts for the hire of seamen on a voyage upon the Missouri River above tide.³ But a narrow rule adapted to the insular England of King James was too restrictive for a continent of vast inland seas and of great rivers, and it was soon abolished. A quarter of a century later than the Missouri River case the same court had before it a proceeding *in rem* for a collision on the tideless Lake Ontario,⁴ and to the renown of American jurisprudence, adjudged the uniform admiralty and maritime jurisdiction of the United States to extend to all the public navigable lakes and rivers of the country. Thenceforth not only the main sea, but all of the navigable waters of the United States, whether landlocked or open, salt or fresh, tide or no tide, came within the jurisdiction of the admiralty.⁵ In the opinion Chief Justice Taney declared that "The Union was formed upon the basis of equal rights among all the states . . . and that it would be contrary to the first principles thereof to confine these rights [*i. e.* the safety of commerce, the administration of prize law, etc.] to the states bordering on the Atlantic and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States." The march of science with its application of steam to water navigation, and the possibility thereby to navigate a vessel against an unchanging current, had fore-ordained the expansion of the admiralty jurisdiction.

¹ The *Lottawanna*, 21 Wall. (U. S.) 558 (1875); *Butler v. Boston & Savannah S. Co.*, 130 U. S. 527 (1889).

² Benedict, Admiralty, §§ 228-9.

³ The *Thomas Jefferson*, 10 Wheat. (U. S.) 428 (1825).

⁴ The *Genesee Chief*, 12 How. (U. S.) 443 (1851).

⁵ *Dunham's Case*, 11 Wall. (U. S.) 1 (1871).

Again, as illustrating the expansive tendency, the Supreme Court had said that state legislatures have no authority to create a maritime lien,¹ but later the court sustained and enforced in admiralty a lien created by a law of Louisiana for supplies furnished to a ship at her home port, no lien therefor existing under the general maritime law, as the Congress had provided none. The states, it was held, might legislate until Congress chose to act in exercise of its constitutional power to regulate commerce.²

An instance of the progressive movement through remedial legislation is the statute assimilating the law of America to that long existing in continental Europe, whereby innocent shipowners can limit their liability for damages caused by their vessel to the value of their pecuniary interest in her and her freight pending,³ and a second instance of legislation of like kind is the so-called Harter Act of February 13, 1893,⁴ applicable, however, only between vessel owner and shipper. The general scheme of this statute is to make the ship liable for faults in connection with the ordinary shipment and stowage of her cargo, but to allow her exemption from liability for mere negligence in navigation or management of the vessel after the voyage has commenced.⁵

These preliminary matters considered, we pass to the civil liability in admiralty for the death of a human being, which was the concrete question in the two cases of "La Bourgogne" and "The Hamilton."

"It is a singular fact that by the common law of England the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy,"⁶ or, as stated by Lord Ellenborough, "in a civil court the death of a human being could not be complained of as an injury."⁷ This doctrine of substantive law had its origin in England in the technical rule of mere procedure expressed in the maxim that a personal action dies with the person: "*Actio personalis moritur cum persona.*" But the contrary legal doctrine is so well established in other European countries as to be there considered a part of the general body of the law administered by maritime nations.⁸

¹ The *Belfast v. Boon*, 7 Wall. (U. S.) 624 (1869).

² The *Lottawanna*, 21 Wall. (U. S.) 558 (1875).

³ 9 Stat. at L. 635 (1851).

⁴ 27 Stat. at L. 445 (1893).

⁵ Hughes, Admiralty, 173.

⁶ *Goodsell v. Hartford, etc., R. R. Co.*, 33 Conn. 51 (1865).

⁷ *Baker v. Bolton*, 1 Camp. 493 (1808).

⁸ Hughes, Admiralty, 198.

In Holland the right of action for death seems to have prevailed for centuries.¹ In Scotland the unwritten law permits the wife or family of a deceased person to sue for damages caused by his death.² The German Code of 1896 (*Bürgerliches Gesetzbuch*) expressly specifying deliberate or negligent (*vorsätzlich oder fahrlässig*) injury to life as a cause of action, is merely declaratory of the law as anteriorly ruled by the German Imperial Court of Civil Jurisdiction (*Reichsgericht in Civilsachen*).³ The law of Austria confers the right of recovery upon the widow and children of the deceased.⁴ In France the Marine Ordinance of Louis XIV (1681) did not mention the subject, but it is thoroughly settled by judicial interpretation of the Code Napoléon that there is a right of action for death thereunder, although the Code itself does not refer expressly to the killing of a human being. Its provision in general language requires reparation for every act of man which causes injury to another, whether produced by the defendant, his agent or anything which the defendant has in charge.⁵ The Code of Italy, literally translating and re-enacting this language, has been similarly expounded, and it has been decided that the surviving relative who sues need not even show the share which he had in the deceased's earnings.⁶ This principle of the Italian law is in marked contrast to the principle underlying Lord Campbell's Act and its American prototypes hereinafter mentioned. They permit the recovery of compensation for direct pecuniary loss

¹ Grotius, Book 3, c. 33 (Herbert ed., London, 1845).

² Bell, Comm. (1872) § 2029; *Clarke v. Coal Co.*, App. Cas. 412 (1891).

³ *Bürgerliches Gesetzbuch* vom 18. August, 1896 (Munich, 1906). Sec. 823. "Wer vorsätzlich oder fahrlässig, das Leben, den Körper, die Gesundheit, die Freiheit, das Eigenthum oder ein sonstiges Recht eines Anderen, widerrechtlich verletzt, ist dem Anderen zum Ersatze des daraus entstehenden Schadens verpflichtet." *Entscheidungen des Reichsgerichts in Civilsachen*, Vol. 7, p. 139 (1882).

⁴ Das allgemeine bürgerliche Gesetzbuch für das Kaiserthum Oesterreich (Vienna, 1873). Sec. 1327. "Erfolgt aus einer körperlichen Verletzung der Tod, so müssen nicht nur alle Kosten, sondern auch der hinterlassenen Frau und den Kindern des Getödteten das, was ihnen dadurch entgangen ist, ersetzt werden."

⁵ Code Napoléon. Sec. 1382. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer." Sec. 1384. "On est responsable non-seulement du dommage que l'on cause par son propre fait, mais encore, de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses, que l'on a sous sa garde."

⁶ Codice Civile del Regno d'Italia (Florence, 1905, annotated). Sec. 1151. "Qualunque fatto dell'uomo che arreca danno ad altri, obbliga quello per colpa del quale è avvenuto, a risarcire il danno." Sec. 1153. "Ciascuno parimente è obbligato non solo pel danno che cagiona per fatto proprio, ma anche per quello che viene arrecato col fatto delle persone delle quali deve rispondere, o colle cose che ha in custodia."

only.¹ The law of Switzerland concerning civil indemnity for death is as specific as that of Germany; the Statute of Belgium is a reproduction of that of France, and the Codes of Spain and Portugal contain a general provision requiring reparation for every damage caused to others or their rights.²

On August 26, 1846, Parliament abrogated the ancient rule of the English realm and gave a civil right of action for death.³ Similar legislation creating personal responsibility has followed in most of the American States.⁴ The House of Lords, it is true, has held the terms of the English statute inapplicable to suits *in rem* in the admiralty,⁵ but it seems to apply to proceedings *in personam* in that court,⁶ although foreigners are probably excluded from its benefits.⁷

But prior to this legislation the common law of England, as already explained, denied the recovery for death. The numerous authorities on the point are so uniform that the United States Supreme Court has said that it is impossible to speak of the question as open.⁸ Unless changed by statute, this archaic law still prevails everywhere in the United States excepting perhaps in Louisiana.

And although the "admiralty may be styled, not improperly, that human providence that watches over the rights and interests of those who go down to the sea in ships and do their business on the great waters,"⁹ no controlling authority could be found by the Supreme Court to make the rule of the general maritime law of America different in this respect from that of the common law.¹⁰

¹ *Pym v. Great Northern Ry.*, 2 B. & S. 759 (1862); *Coughlan's Case*, 24 Md. 84 (1866).

² Code Fédéral des Obligations (Berne, 1881). Sec. 50. "Quiconque cause sans droit un dommage à autrui, soit à dessein, soit par négligence ou par imprudence, est tenu de le réparer." Sec. 52. "... Lorsque, par suite de la mort, d'autres personnes sont privées de leur soutien, il y a également de les indemniser de cette perte." Codes Belges LIV; III; Tit. IV, Secs. 1382 and 1384 (Brussels, 1902). El Código Civil Vol. 2, Art. 1902 (Madrid, 1896). "El que por acción ú omisión causa daño á otro, interviniendo culpa ó negligencia, está obligado á reparar el daño causado." Codico Civil Portuguez, Parte IV, Livro I, Titulo 1 (Lisbon, 1892).

³ 9 & 10 Vict., c. 93 (1846).

⁴ *E.g.*, Md. Code Pub. Gen. Laws, Art. 67, Statute enacted 1852.

⁵ *The Vera Cruz*, 10 App. Cas. 59 (1884); *The Corsair*, 145 U. S. 335 (1892).

⁶ *The Bernina*, 13 App. Cas. 1 (1888).

⁷ *Adam v. The British & Foreign S. S. Co. Ltd.*, [1898] 2 Q. B. 430.

⁸ *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754 (1878).

⁹ *The Highland Light*, Chase's Dec., 150 (1867).

¹⁰ *The Harrisburg*, 119 U. S. 199 (1886).

Thus for many years it had been indisputably settled that in the absence of legislation no suit could be maintained in admiralty to recover damages for the death of a human being caused by negligence. And so stood the maritime law of the American courts when "La Bourgogne" and "The Hamilton" cases were finally adjudicated on appeal.

It is perfectly obvious that the federal Congress might pass a bill providing for the recovery of such damages for death under its power to regulate commerce with foreign nations and among the several states, and in pursuance of the constitutional provision extending the judicial power of the government to "all cases of admiralty and maritime jurisdiction,"¹ but until the decision in the case of "The Hamilton" on December 23, 1907, no ruling had been made by the Supreme Court determining whether a single state could by statute create such a liability enforceable in the admiralty. The Supreme Court had indeed twenty years ago expressly declined to give an opinion upon the point,² and diverse rulings as to the power of a state had ensued in the lower courts. One federal judge in a case *in rem* where reliance had been placed by the libellant on the death statute of Pennsylvania, had gone so far as to say that if the state statute undertook to give a lien in case of death, he would declare it inoperative.³ And another judge had held, when considering a case *in rem* under the Virginia statute, which then only provided a remedy *in personam*, that a state could not create a maritime right or confer jurisdiction in any particular upon an admiralty court.⁴ But other judges had sustained state statutes and by virtue thereof had enforced liens in admiralty — in one instance even where the law did not purport to give a lien.⁵

¹ U. S. Const., Art. I, § 8; Art. III, § 2.

² *Butler v. Boston & Sav. S. S. Co.*, 130 U. S. 527 (1889).

³ *The North Cambria*, 40 Fed. 655 (Butler, J.) (1889).

⁴ *Hughes, J.*, in *The Manhasset*, 18 Fed. 918 (1884); *Holmes v. O. & C. Ry. Co.*, 5 Fed. 75 (1880), *in personam*.

An amendment of the Virginia statute now expressly permits the filing of a libel *in rem* against the offending ship. 2 Va. Code, Annotated (1904), § 2902; and the United States Circuit Court of Appeals for the Fourth Circuit enforced this statutory lien *in rem* in the admiralty where the tort had occurred on territorial waters of the state. *The Glendale*, 26 C. C. A. 500 (1897).

⁵ *The Oregon*, 45 Fed. 62 (1891), enforcing *in rem* the Oregon statute which provides that every boat or vessel used in navigating the waters of the State of Oregon shall be liable and subject to a lien for damages or injuries done to persons or property by such boat or vessel. Oregon Code (Comp. 1902), § 5706.

The Garland, 5 Fed. 924 (1881), upholding the Michigan statute in a suit *in rem*, although statute gives no lien.

In this chaos of contrary rulings the Hon. Addison Brown, a most experienced judge, then presiding in the United States District Court for the Southern District of New York, had, in an opinion of notable perspicacity and erudition, reviewed the precedents and enforced the New York death statute under a libel *in personam* where the tort had occurred on the navigable waters of the state.¹ And similarly, the Hon. William H. Taft, then a Circuit Judge, delivered the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, applying the death statute of the Dominion of Canada in a proceeding *in personam* where a collision had occurred upon Canadian waters.² These two cases, it will be observed, were instances of torts on strictly territorial waters, and the application of the local law was made by the court only thereto, but not to the high seas. By contrast, where the tort had occurred on the ocean, the federal courts sitting in Illinois refused to enforce the law of France in suits *in personam* arising out of the sinking of "La Bourgogne."³ The argument was rejected in Illinois that the cause of action must be considered to have arisen within the French territorial jurisdiction. In this condition of the adjudications the Hamilton case⁴ reached the Supreme Court of the United States. The suit arose out of proceedings to limit liability taken in the United States District Court at New York. The owners of the colliding vessels were both corporations of the State of Delaware. Each ship had its home port in that state. The collision occurred at sea off the coast of Virginia. Both vessels were held at fault by the District Court, the Circuit Court of Appeals, and the Supreme Court, successively.⁵ Eight persons (*i. e.*, five passengers and three mariners) were drowned in the disaster. There was no pretense that any of them had been negligent, and their representatives, unable to recover damages by the law of the flag, sought relief under the statute of the particular state where the ships happened to be domiciled. The statute, after enacting that actions for injuries to the person shall not abate by reason of the plaintiff's death, provides that, "whenever death shall be occasioned by unlawful violence or negligence, and no suit has been brought by the party injured to recover damages during his or her life, the widow

¹ The City of Norwalk, 55 Fed. 98 (1893).

² Robinson v. Det. & C. Steam Nav. Co., 20 C. C. A. 86 (1896).

³ Ruddell v. Compagnie Générale Transatlantique, 94 Fed. 366 (1899), and 100 Fed. 655 (1900).

⁴ 207 U. S. 398 (1908).

⁵ 134 Fed. 95 (1904); 146 Fed. 724 (1906); 207 U. S. 398 (1907).

or widower of any such deceased person, or if there be no widow or widower, the personal representatives may maintain an action for and recover damages for the death and loss thus occasioned."¹

The libellants contended that the ships, although actually on the high seas, were still constructively portions of the territory of the state of Delaware, and subject to her laws. Counsel for the shipowner urged, with much force and cogency of reasoning, that the relation of the parties should not in admiralty be regarded as fixed by the laws of a particular state when the injury occurs on the open sea, through a purely marine tort, and that the federal courts of America should in admiralty decide the liability for wrongs committed outside of territorial waters by the rules of admiralty as administered by the federal forum, which forum gives no damages for death. And it was further urged that no state can by legislation destroy the very symmetry of the maritime law of the Union, to preserve which was a controlling reason for conferring on the general government exclusive jurisdiction in admiralty.

But notwithstanding the argument at the bar, the doubt expressed by the court twenty years before in the case of *Butler v. Boston & Savannah S. S. Co.*² was now finally resolved by the Supreme Court in favor of the validity of the Delaware statute, and it was further held that the Act was not confined to deaths occasioned on land, but that it created an obligation for deaths occasioned at sea which could be enforced in admiralty. And thus the operation of the rule under which Judge Brown had merely applied the New York statute to the strictly territorial waters of that state, and under which Judge Taft had only enforced the Canada statute on the strictly territorial waters of the Dominion, was now extended by the Supreme Court to the ocean itself; and the Delaware statute was there applied by the fiction that her ships were legally still a part of Delaware territory although they were actually on the high seas of all nations. The court said further that the result of a state statute giving a proceeding *in personam* would not be the creation of different laws for different federal districts. The liability would be recognized in all. Nor would this create any lack of uniformity. Courts constantly enforce rights arising from and depending on other laws than those governing the local transactions of the jurisdictions in which they sit. But the court carefully added that

¹ Act of Jan. 26, 1886, as amended by Act of March 9, 1901. Del. Laws, 1901, vol. 31, p. 500.

² 130 U. S. 527 (1889).

it was not concerned with these considerations in the case before it. The legislation of the United States has enabled the owner to transfer his liability to a fund and to the exclusive jurisdiction of the admiralty, and he had elected to do so. That fund being in course of distribution, "all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not," since the federal statute allows the liability to be asserted and proved against the fund.

The views thus expressed in the Hamilton case were inevitably followed by the enforcement of the law of France in the case of "*La Bourgogne*." That vessel was, as already stated, sunk in collision by a British ship on the high seas sixty miles off Sable Island. Most of her passengers, her captain, and other principal officers and many of the crew went down with her. The case, like the Hamilton case, came before the Supreme Court upon proceedings taken by the shipowner himself to limit liability. The value of the surrendered property, consisting of life boats and life rafts, was supposed not to exceed \$100, while the total claims presented aggregated more than \$2,000,000. Many death claims figured in the list. While "*La Bourgogne*" was held liable for the single fault of proceeding too fast in a fog, no privity or knowledge was proven on the part of *La Compagnie Générale Transatlantique*, and the company's right to limit liability was sustained. The total fund for distribution consisted of the life boats and rafts, plus freight and passage money prepaid for the voyage from New York to Havre, aggregating in all less than \$23,000.

The ultimate decision in the case of "*La Bourgogne*" might, in view of the prior evolution of the maritime law already noted, have been reasonably anticipated. In fact Mr. C. Philip Wardner of the Boston Bar had forecast the result of the litigation in an able critique of the earlier and contrary rulings in Illinois concerning the same collision.¹

The Supreme Court in that case had applied the well-known doctrine of the law of the flag to a tort on the high seas. But in the Hamilton case it was not the law of a foreign power but the law of a particular state of the American Union which was applied to a tort similarly committed. The vessels registered in Delaware carried the flag of the United States of America and not the flag of Delaware. The two ships involved in the collision were bound,

¹ 21 Harv. L. Rev. 1-22, 75-91.

one from a port of New York to a port of Virginia, and the other from a port of Virginia to a port of Pennsylvania, and consequently were engaged in commerce among the several states. The legal embarrassment is apparent, arising from the duality of sovereignty in the American government. As already shown, the several states are on the one hand mere integral parts of an entire domain constituting the United States of America, and have ceded to the central authority an absolute and exclusive jurisdiction in admiralty. On the other hand, they have retained as independent sovereignties a jurisdiction over the unceded or unprohibited areas of governmental power. And thus Delaware has been treated by the Supreme Court as a sovereign entity legislating for an American ship while on the high seas, because the vessel was registered in a port of Delaware and would by legal fiction remain everywhere a part of her territory. But even if we are persuaded of the correctness of the decision in the case of the *Hamilton*, the present situation is anomalous, and the principles enunciated if applied to support an independent action brought by the personal representatives of the deceased against a ship or owner to recover for death, may lead to great difficulties and certainly to unsatisfactory results, unless Congress enacts a general death statute.

In 1875 the Supreme Court declared that the "Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country; that it could not have been the intention to place the rules and limits of the maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." The court further said that it would undoubtedly be far more satisfactory to have a uniform law regulating such liens.¹

Delaware, the first state to adopt the Constitution of the United States, undoubtedly surrendered to the courts of the federal government exclusive jurisdiction in admiralty, and to the federal Congress the power to regulate commerce with foreign nations and among the several states. To say, then, that an individual state, like Delaware, may, in the absence of paramount legislation by Congress, regulate the rights of those who travel on the high

¹ *The Lottawanna*, 21 Wall. (U. S.) 558 (1875).

seas in American ships registered at her ports, is indeed an anomalous, even if it be, as it probably is, a necessary, sequence to earlier decisions. The law of the sea is of universal obligation. No single nation, certainly not a single state, should be allowed to create obligations for the world.¹ "Everywhere the sea's the sea." Πᾶσα θάλασσα θάλασσα, said the old Greek.

Looking to the future, it would perhaps have been more fortunate for the court of last resort to adhere to its own law, the law of the admiralty forum, and to deny to the representatives of those killed in the collision the damages which could not be recovered under the general maritime system, but only by the special statute of Delaware. Congress could then have changed the legal rule.

From the foregoing it is apparent that there is no present right of recovery for loss of life by negligence on the high seas, either by the general maritime law of the United States or by federal statute. It is now also settled by the Hamilton and La Bourgogne cases, that if the owner of an offending ship surrenders the remains of his property with freight pending in order to limit his liability, persons entitled to an action by reason of the death of their decedent under the law of the ship's flag or domicile, will be allowed, upon being brought into court, to participate in the distribution of the fund. But on the other hand it has not yet been determined by the Supreme Court in a case of death on the high seas, that a lien created upon the ship itself by a statute of one of the American states will be enforced in admiralty, nor has it been expressly decided by that court that an action *in personam* will lie in the admiralty under a statute of the state of the ship's domicile. What may be the next step in the development of the law does not yet appear. Even if the same rule should prevail in direct suits as under the shipowner's petition to limit liability, the court may find it difficult to decide what law to apply in a collision at sea between two American vessels. For instance, where one is registered in Maryland, with its broad death statute, and the other is registered in a state whose statute obviously applies only to torts on land. Or, to take another illustration: The Code of Delaware authorizes recovery on behalf of any next of kin, whereas the Code of Maryland permits no recovery whatsoever for beneficiaries other than husband or wife, children or parent of the deceased. What law would an American court of admiralty now

¹ The Scotia, 14 Wall. (U. S.) 170 (1872).

apply in a case of collision at sea resulting in the death of a man leaving only collateral next of kin for whom suit could not be brought under the law of Maryland? Or what would be the maximum recovery where the statute of one state fixed no amount (*e. g.*, Maryland) and the statute of the other state (*e. g.*, Virginia, New York, or Oregon) prescribed an absolute limit?

The Maritime Law Association of the United States has for years sought to procure the passage of an Act for the federal courts which would eliminate these difficulties, and in 1903 it prepared and submitted such a bill to Congress.¹ No definite action in reference to it has yet been taken by the National Legislature, but it is to be hoped that Congress may speedily grant the right of civil redress in death cases provided by Lord Campbell's Act and the Continental Codes. A private remedy for the negligent deprivation of life, existing throughout Western Europe and in most of the American states, as well as in the federal District of Columbia,² it behooves the United States in their national capacity to assimilate their law to the European law and that of the component states of the Union.³

¹ See Appendix.

² Code of District of Columbia (1901), §§ 1301-2.

³ BILL PROPOSED BY THE MARITIME LAW ASSOCIATION OF
THE UNITED STATES.

AN ACT TO AUTHORIZE THE MAINTENANCE OF ACTIONS FOR NEGLIGENCE CAUSING
DEATH IN MARITIME CASES.

BE IT ENACTED THAT:

SECTION 1. Whenever an action, whether *in rem* or *in personam*, might have been maintained by any injured party, had death not occurred, to recover damages for personal injury happening to such person on the high seas, the Great Lakes, or any navigable waters of the United States, or if happening to any of the passengers or crew on board of any vessel of the United States, then in whatsoever waters such vessel may have been at the time of such injury, such injury in every such case having been caused by the wrongful act, neglect, or default of another and though amounting to a felony, then, if such personal injury shall result in the death, whether on land or water, of the person injured, an action *in rem* or *in personam* as may be appropriate, may be brought for the exclusive benefit of the deceased's husband, wife, or next of kin, by the personal representatives of the deceased against the vessel foreign or domestic or the persons that would have been liable to the deceased if death had not occurred. And in such action such personal representatives may recover such damages as shall be fair and just compensation, with reference to the pecuniary damages resulting from such injury and death to the deceased's husband, wife or next of kin, severally, not exceeding in all the sum of \$5,000, to be apportioned among them at the trial, according to the pecuniary damages severally sustained by them, provided, however, that such action, if *in rem*, shall be brought within one year, or if *in personam*, within two years, after the decedent's death; but if the vessel or the

It is true that the American courts of admiralty have, without the aid of a statute, found in several instances of death, the means of preventing the injustice which would have followed an adherence to the law of the admiralty forum, for the paramount and universal law "laid up in the bosom of God," upholds the sanctity of human life. Justice, the great interest of mankind on earth, is the ligament which binds the civilized nations together.¹ It knows no distinction of nationality, of time, or of place. Its universality, its duration, and its immutability are thus portrayed in the lofty words of the greatest of Roman orators: "Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnis gentis, et omni tempore, una lex, et sempiterna et immutabilis continebit."²

George Whitelock.

BALTIMORE.

SUPPLEMENTAL NOTE. — The recent collision at sea between the British steamship *Republic* and the Italian steamship *Florida* further emphasizes the importance of Federal legislation concerning damages for death by negligence.

persons liable be absent from the United States at the time of such death, the periods above limited for the commencement of the action against them respectively shall be counted from the time of the first presence of such vessel or persons within the United States affording reasonable opportunity for service of process upon them after such injured person's death.

SECTION 2. If at the decedent's death, any action brought by him to recover damages for such injuries be pending and undetermined, such action shall proceed no further, except that his personal representatives may at their option on petition to the Court and upon such notice to the defendant as the Court may direct, be substituted as plaintiffs in that action, and such amendment of pleadings be made as the Court may direct, and the action may on order of the Court thereafter proceed for the recovery of damages pursuant to this Act, and not otherwise; if final judgment on the merits has been rendered in the deceased's lifetime in any action brought by him for such injuries, such judgment shall be a bar to any other action therefor, except for the enforcement of such judgment.

Except as in this Section provided no other action than that given by the preceding Section shall be maintained by reason of such injuries.

SECTION 3. This Act shall not abridge the rights of shipowners and others to avail themselves of the provisions of Sections 4282, 4283, 4285, 4286 and 4287 of the Revised Statutes of the United States, and Acts amendatory thereof and additional thereto relating to limitations of liability; nor the right of suitors to a remedy *in personam* in the Courts of the several States and elsewhere, for the recovery of damages under this Act, against any person or corporation liable therefor.

SECTION 4. In any action brought under this Act, negligence or contributory negligence of the decedent shall have the same effect as to the damages recoverable as if the action were an action brought by the injured person, but the damages are not in any case to exceed the limit above provided.

¹ Webster's Address on Story.

² Cicero, *De Re Publica*, III, 28-33 (Tauchnitz, Leipzig, 1865, p. 214).

The claimant of the Florida has instituted limited liability proceedings in the United States District Court for the Southern District of New York. It may be assumed under the doctrine of *La Bourgogne* that the existence *vel non* of negligence causing the collision will be determined according to American legal standards. No damages for the death of the victims being recoverable under the general maritime law of America, the representatives of those killed must rely on law foreign to the forum. If the Florida is held at fault, valid death claims would seem entitled to participate in the distribution of the fund arising from the sale of that vessel. But the general right to participation will depend upon the Code of Italy, and not upon the maritime law of the United States. If, on the other hand, the Republic is held liable for the collision, and her owner seeks to limit liability, it is an interesting question as to what law, if any, can be invoked to sustain the death claims, and whether or not persons other than British citizens are excluded from the benefits of the English death enactment.

G. W.

MEASURE OF DAMAGES WHEN PROPERTY IS WRONGFULLY TAKEN BY A PRIVATE INDIVIDUAL.

WHERE chattels, or land, are not destroyed, nor taken by condemnation proceedings, but are taken by a private person, what shall be the measure of damages for the loss? Shall it be the value as of the time of taking or of the time of demand? Shall it be the same whether the injury is caused innocently or knowingly? Shall the loss always be measured by compensatory damages, or shall exemplary damages sometimes be allowed? These are some of the questions that come flocking to meet one as he enters this interesting field of legal thought.

The loss may be occasioned in any one of three different ways: A person may appropriate another's chattels, or sever a part of his land and appropriate it as chattels, either inadvertently or knowingly but not maliciously, or maliciously. The party injured may seek his redress through an action in replevin, or conversion, or trespass. So that the question of the measure of damages for the wrongful taking of one's property arises in nine different ways.

If a person injured elects to sue in trespass, he may recover exemplary damages, if the act is wanton, or malicious; the diminished value of his land, that is the value in place of the articles removed together with any injury to the freehold by reason of the removal, if there is a wrongful entry on his land; and the actual value to him of the things taken, if they have no market value; but, in this form of action, he may also recover for any enhanced value given to the chattels by the labor of the wrongdoer, if not through inadvertence.¹

If the person injured sues in conversion, or trover, exemplary damages are recoverable as in the case of a suit in trespass if the act is malicious; the enhanced value given to the chattels by the labor of the wrongdoer, if the act is done knowingly; but only the value at the time of taking, or after severance in case of severance from realty (though some cases hold that the value should be

¹ *Engle v. Jones*, 51 Mo. 316; *Brown v. Allen*, 35 Ia. 306; cases *infra*.

before severance, or in place), with interest, if the taking is inadvertent and innocent.¹

If the person injured prefers to sue in replevin, he is entitled in the alternative, either to damages, as in the case of conversion, or the return of the chattels, whether taken knowingly or inadvertently, unless the advertent wrongdoer changes them in species, or so increases them in value that the original chattels are mere accessories and the new value is out of all proportion to the original, or confuses them with other goods of unequal grade, but if he requires the return of chattels taken by an innocent wrongdoer, or by an innocent purchaser from an intentional wrongdoer, in either case he is required to compensate such innocent party for the enhanced value given by him.²

These propositions, which are generally adhered to, suggest a number of questions, and the first is regarding exemplary damages. These are not allowed on any theory of compensation to the injured party, but rather for the purpose of punishing the wrongdoer and as a warning to others. Do such damages have any place in civil actions? The writer thinks not. This question has been so often discussed that it is becoming somewhat threadbare, and it is not his purpose to enter into any extended treatment of the same, but merely to give a sort of summary of the arguments against the awarding of exemplary damages, especially for violation of property rights. There are two kinds of wrongs, public and private, the former violating the rights which inhere in the people as a whole, and the latter the rights which belong to some individual. The remedy for the violation of a public right is criminal punishment, of a private right, redress, which can be accomplished either by the restoration of that of which a person has been deprived, or by awarding him compensation therefor. The early idea of private vengeance has been supplanted by the criminal law, so that there is no longer any place for it in civil law, and place cannot be made for it by talking about punishing a person for the public and for the sufferer in the right of the public. The allowance of exem-

¹ *White et al v. Yawkey*, 108 Ala. 270; *Beede v. Lamprey*, 64 N. H. 510; *Gaskins v. Davis*, 115 N. C. 85; *Eaton v. Langley*, 65 Ark. 448; *Wooden Ware Co. v. United States*, 106 U. S. 432; *Forsyth v. Wells*, 41 Pa. St. 291; *McLean Co. Coal Co. v. Long*, 81 Ill. 359; *Single v. Schneider*, 24 Wis. 299; *Winchester v. Craig*, 33 Mich. 205; *Tuttle v. White*, 46 Mich. 485; *Nesbitt v. St. Paul Lbr. Co.*, 21 Minn. 491.

² *Silsbury v. McCoon*, 3 N. Y. 379; *Wetherbee v. Green*, 22 Mich. 311; *Pratt v. Bryant*, 20 Vt. 333; *State v. Shevlin-Carpenter Co.*, 62 Minn. 99; *Eaton v. Langley*, 65 Ark. 448.

plary damages puts a man in jeopardy twice for the same offense, contrary to provisions in State and Federal constitutions, for, though the same wrong is inflicted, the fine awarded as punishment in the civil action does not prevent indictment and prosecution in a criminal action, and punishment in a criminal suit is not admissible in mitigation of exemplary damages. The purpose of these provisions is to prevent double prosecutions for the same offense, and when, in addition to the civil wrong, the same act is split up into two further offenses criminal in nature, whether one is called private and the other public, or both are called public, this purpose is violated, and the accused is harassed with two prosecutions. No hypothesis, however ingenious, can cloud the mind to the fact that exemplary damages put a man in jeopardy once, and, if he is also punished criminally for the same offense, he is "twice put in jeopardy." Again, when assessed exemplary damages, the accused is really punished for a criminal offense without the safeguards of a criminal trial. He is summoned into court to make compensation for a purely private injury, with no issue upon a criminal charge presented; punishment by fine is inflicted without indictment or sworn information; the rules of evidence as to criminal trials are rejected; the doctrine of reasonable doubt is replaced by the rule of preponderance of evidence; the defendant is compelled to testify against himself; and, though in criminal offenses the law fixes a maximum penalty which is imposed by the court, the jury is entirely free to assess exemplary damages, subject only to the power of the court, unwillingly exercised, to set aside the verdict. The procedure and principles of criminal law are disregarded, the rules of damages are forgotten, and the machinery of justice is used for the avowed purpose of giving the plaintiff that to which he has no shadow of right. He recovers compensation for all direct and consequential injuries resulting from a breach of contract or a tort; for the loss of property, of time, of earning capacity, of profits, of reputation, of services and society, for expenses, for physical pain, for mental suffering, for injuries to result in the future as well as those which have already flowed from the wrong; and then, in addition to all this, after exact justice has been meted out between the contending litigants so far as it is possible to do so, he is allowed to recover exemplary damages, not for any injury he has sustained, but as a punishment to the wrongdoer and as an example to others. The doctrine is altogether inconsistent with sound legal principles and it is unfortunate that it ever found lodg-

ment in the law, and we look with admiration upon any court brave enough to disown and abandon it.¹

Passing by the cases of malicious injury, as only involving exemplary damages, we come to suits in trespass, conversion and replevin, both where the injury is caused knowingly but not maliciously and where it is caused inadvertently, and the first question to suggest itself here is whether there should be any difference in the measure of damages in the different cases.

Before proceeding further, we should note that in these cases the question of the allowance of exemplary damages does not arise, for there is lacking that malicious, or wanton, or reckless conduct necessary to warrant the punishment of the offender, even where the doctrine of exemplary damages prevails. It is true that this distinction is not always noticed. The Supreme Court of Minnesota² and other courts have given as a reason why a wilful wrongdoer has to pay greater compensation than an innocent is because "he is entitled to no consideration, and it is just, as a punishment to him and a warning to others, that the full penalty be visited upon him, although the plaintiff gains thereby." But this announces a wrong principle. Conduct must be more vindictive than this before any court can allow exemplary damages. Here the measure of damages is determined by the court, exemplary damages are determined by the jury. Here the damages are awarded as a matter of right, exemplary damages are awarded as a matter of discretion. Whatever damages are recoverable for either the inadvertently, or the knowingly but not maliciously, taking of another's property are compensatory in character.

Can a difference in the measure of damages be predicated on the nature of the action or the fact of knowledge on the part of the wrongdoer? For any legal injury he has sustained, the party injured is entitled to just compensation, and no more. He is entitled to be placed in the same situation, so far as money can do so, as though no wrong had been committed. He has a right to be made whole again. To give him any less than this still leaves him an injured party; there is some injury not redressed. But, to give him any more than this, instead of exactly redressing his injury, causes a new injury to the first wrongdoer, who is now the injured party. Hence, no matter what the form of the action, the object is the same, and a different rule of damages should not and does

¹ 8 Eng. Rul. Cas. 360-382; 1 L. R. A. Dig. 933-937.

² State v. Shevlin-Carpenter Co., 62 Minn. 99.

not prevail, in trespass, conversion and replevin, except when circumstances of aggravation are relied upon. Unless vindictive damages are sought a person is restricted to compensation for his pecuniary loss. There is no reason or principle why for the same injury the measure of damages should be different in one form of tort action than in another; the loss is the same, and the redress should be the same; to hold otherwise is to permit the form of the action rather than the actual injury, to fix the damages. That a person sometimes recovers more in trespass than in conversion is due to the fact that he is suing for a different injury, or injuries. For example, he may sue in trespass for injuries to chattels and land, but if he sues in conversion or replevin he sues only for the injuries to the chattels. There is as little foundation for a distinction between a case where an injury is caused knowingly, but not in such a way as to call forth exemplary damages, and a case where it is caused inadvertently. A man is damaged just as much whether the injury is caused by mistake or intentionally, and whatever rule of damages is adopted in one case should be adopted in the other. A, innocently, and B, intentionally, trespass upon C's land and cut some of his timber, each cutting the same quantity and grade. A has caused C just as great an injury as has B. A and B each transports to distant markets the timber which he has cut and works it up into lumber, the value of the lumber which A holds being identical with the value of that B holds. B has now caused C no greater loss than has A. There should be no difference in the measure of damages because either of the form of the action, or because of the intent with which the wrongful act is done.

At last we are ready for the question, What shall be the measure of damages? Shall it be the value at the time of taking, or the enhanced value? Having decided that the rule should not vary with the form of the action nor the intent of the wrongdoer, the next and most difficult question which arises is the determination of what that rule shall be. The true measure of damages for an injury of this sort is the enhanced value at the time of demand, or suit. At the time of the taking the owner has not sustained all the injury that it is possible for him to sustain from the loss of his chattels, nor is that all the injury which the wrongdoer causes him, so that the injured party is entitled only to compensation for the injury caused by the taking with interest on that amount to the time of trial. His title and right to the possession of the property

continue. He does not have to consider it converted unless he so desires. He has a right to treat it as converted at any time between the time of taking and the commencement of the action. The title can be changed only by an agreement of the parties, or a satisfaction of a judgment, except where an innocent party changes the identity of the chattels, or so increases their value that it is out of all proportion to the original value. Hence the injured party is entitled at any time, before the running of the statute of limitations, to the return of his property or to its value. This the cases all hold, in the case of an intentional wrongdoer. But, apparently, this is not the general holding of the courts in the case of an inadvertent wrongdoer. It is the object of this article to show that the courts either do not or ought not to make such a distinction. It is hoped that the last has already been done; it remains to explain the apparent conflict in the adjudicated cases.

The real difficulty in the situation is not seen when we look simply at the party who has lost his property; we must look at the party who has taken it, or who has purchased it from the taker. Suppose that the latter takes a colt, when it has very little value, that he feeds and cares for it two years, that he puts it into the hands of an expert trainer, until it becomes a valuable race horse, worth three thousand dollars. Suppose that a trespasser cuts timber, and mostly by his own labor and expense increases it in value three or four times. Suppose that this occurs with any one of a thousand things. Shall the one who thus enhances the value of a thing lose all the fruits of his labor? If he all the time knows that he is conferring these benefits upon another party, yes; but, if he is ignorant of this fact and is acting *bona fide* and innocently, no. The courts are right in drawing the sharp distinction which they have drawn between the cases of intentional and inadvertent trespasses, but many of them have made a mistake as to the remedy to be applied. The solution for all the difficulties here arising lies, not in announcing different rules, or measures, of damages, for the loss which the original owner has sustained, but in finding some right of action for the innocent party who has added his labor to the other's chattels. This is found in *quasi* contracts. After this enhancement in value, both parties have an interest in the property. The wrongdoer has an equitable interest in the property to the extent that he has increased its value by his labor bestowed upon it in good faith. Accordingly when sued by the original owner, whether in replevin

or in conversion, he is entitled to set up a counterclaim for the reasonable value of the benefits which he bestows upon the original owner when the latter elects to accept them by bringing suit. This is not the difference between the value of the property at the time of taking and suit, but the value of the benefits which the wrongdoer innocently bestows, not to exceed that amount. The increased value is the joint result of the original material and the work and materials expended by the laborer, with sometimes an independent cause, like a better market, contributing to the enhanced value. The wrongdoer, though innocent, is not entitled to all this: the ordinary measure of damages in *quasi* contracts is the true criterion, and the benefits for which he is entitled to recover are only those which he has added to the chattels after severance, where land is taken and converted into chattels and improved, for the trespasser has added no value to the land; he can recover for only the added value he has given the chattels. On this last point there is conflict in the English and American cases, the rule in the case of minerals severed being stated so as to include all improvements since they were in place, but it is believed that in general the rule here announced is correct.

The rule of damages adopted and applied by many of our state courts and by our United States Supreme Court is unjust and an outrage on the rights of property. By the rule of these tribunals, instead of the owner receiving the profits that are made from the objects of his ownership, the profits are given to the trespasser. This is nothing more than judicial robbery. It is allowing one man to take another's property without paying any compensation. The true rule should compensate the innocent party for the labor and expense he has bestowed upon the chattels to the extent their value is enhanced thereby, but it should give all the other advantages of ownership to the owner. Thus, if A inadvertently trespasses on B's land and cuts timber, when its value standing is three dollars a thousand and after severance four dollars a thousand, and he then transports it to his saw-mill and saws it up into boards at a total expense of five dollars a thousand, but at that time and place the value of the lumber is twenty dollars a thousand, B should be allowed to sue A in any form of action and recover either the lumber or its present value of twenty dollars, less five dollars a thousand. That is, in a suit in conversion, he should recover fifteen dollars, whereas, according to the cases criticized, he would at the most recover only four dollars a thousand, and A

would put the eleven dollars of profit into his pocket; and, though not in this ratio, this is exactly what some of our largest lumber companies have been doing for years. Adopt the rule and measure of damages here contended for and there will be less incentive to become innocent trespassers. The wrong, if any, has been caused by the courts, and it should be righted by the courts.

The only limitation upon the allowance of counter damages for benefits conferred is that the courts should exercise great caution in protecting wrongdoers, and only allow them compensation where there is the plainest case of innocence. It is an easy thing for one to claim that he has purchased property in entire good faith, and an easier thing to claim that through innocence and mistake he has unintentionally trespassed over the boundary line of his land and cut timber on another's land, especially if the land trespassed upon happens to belong to the state. There is nothing which has thrown more discredit upon the law than the spectacle given us by some of the courts sitting near the great lumber regions of our country in their endeavors to discover inadvertence in the conduct of some great lumber companies, which have grown rich upon their stealings of timber from private and state lands. But if these courts would adopt the theory herein set forth there would be less likelihood of their giving us another such a spectacle, for it is not so easy to prove a *quasi* contract as to prove inadvertence, where the latter is one's business.

By the use of this conception of *quasi* contracts, the law of damages is freed from inconsistencies; true compensation, the ambition of the law, is accomplished by one uniform perfect rule; the serfdom of form is thrown off; and at the same time complete and careful justice is awarded to all parties, innocent and wilful, sufferers and wrongdoers, owners, trespassers, and purchasers.

Hugh Evander Willis.

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A PLEA FOR STRAIGHT THINKING CONCERNING THE ENFORCEMENT OF LAWS AS THEY EXIST.

IT has become an increasingly prevalent fashion of late for the lay world to criticize our bench and bar. Such criticism is usually based upon the broad claim that our legal system, as now administered, fails to "do justice." Often the basis of censure is the refusal of the courts to construe acts of the legislatures as the lay world in general, or the executive or legislative branches of the government, desire and think proper. We have recently had some notable instances of criticism on this score. A still further ground of detraction has been found in the judgments of our courts condemning certain legislative acts as contravening the constitutional limitations. Such judgments have aroused great hostility where the proscribed legislation had its origin in a wave of strong popular opinion. Or a particular cause, which attracts wide public attention, calls down upon the court passing judgment therein a tremendous "hue and cry" because of the "unjust result" reached, as the populace regard it.

In view of this critical tendency it is important to consider again the nature and origin of our legal system, to the end that we may ascertain whether these criticisms are well founded or baseless.

The optimism of humanity reveals itself in men's adherence to the ideals they have created, even though such ideals are proven impossible of present attainment. When it becomes evident that these ideals are not being realized, we are often perturbed and denunciatory. It is well, too, that we cling pertinaciously to those things which seem desirable to us, for out of our longing and struggling come the great reforms of the world. One great evil, however, results from confusing the ideal with practical and existing conditions — men are unable accurately to measure and judge the motives and conduct of those about them.

Nowhere is this more evident than in the realm of the law. The lofty ideal in our hearts is that of justice. When we find our system of legal and equitable rights and remedies failing to accomplish the desired result, we are prone to attribute many base

motives to the judges and lawyers who administer it. We say: "The object of our laws is justice. When justice does not result, some one has been guilty of a wrong. It must be the lawyers or the judges who have sinned, as they are charged with the administration of the laws." Or, again, when some popular reform has found expression in an act of the legislature and the courts have pronounced it ineffectual to accomplish the object sought, either by reason of faulty expression or on account of some constitutional inhibition, the people say: "Our reform is just and right; the courts and lawyers are aiding injustice when they declare the reform measure to be invalid."

It behooves us, however, to examine these conclusions. Does it follow that our courts and lawyers are performing their duties badly if what we regard as justice at the moment fails to result from the decisions of our courts and the applications of our rules of law? There can be no doubt that such is the *desideratum* — our ideal, in other words; but is it the fact? To get our answer it is necessary to consider the foundation upon which our legal structure is based.

It seems clear that the structure is entirely artificial. We may grant that our laws owe their origin to the innate longing of mankind for justice. But we then have to define "justice," and history shows us that this is a most elastic term. It certainly meant to our good Puritan forefathers something very different from what it does to us, and yet neither their nor our motives are to be impugned. There is no escape from the conclusion that our laws have sprung into being from wholly artificial agreements or rules as to conduct. In the beginning "might made right." If one had found a bright pebble which his neighbor wanted, the latter took it if he could. Eventually a rule was adopted that strength should not be the criterion, but that prior possession should settle the matter. Then arose a controversy as to what should be deemed to constitute prior possession, and a regulation was adopted to cover that point. Next came the question of what should happen to the pebble if the possessor died, and a rule was formulated on this subject.

In process of time the two men became hundreds and the hundreds thousands, and the questions for solution well-nigh innumerable. Then the informal compacts or rules necessarily became "laws."

They were none the less artificial, however. The right of the

Biblical patriarchs to the undisturbed possession of several wives, as well as our more circumscribed claim to one, rested and rests only upon the obligation of the other members of society to respect such right and claim. In other words, it was recognized that the peaceable association of men in groups required some fixed and dependable regulation or adjustment of their conflicting interests, and that any such regulation or adjustment had to be created, out of whole cloth, as it were, by an agreement or rule of conduct which would effect the desired result. We are pleased to say often that this or that "right" is founded upon "abstract justice," but this only means that all men have concurred in the establishment of the rule which creates the "right," without dissent. For example, men have uniformly agreed for many centuries that their conflicting interests can be best harmonized by allowing the finder of the pebble to keep it as against the desire of his stronger fellow to take it away. But this does not mean that the finder has any inherent "right" to it; it only shows that there has been no difference of opinion as to the best form of adjustment.

After a time another difficulty presented itself: there appeared two men, each claiming to be the prior possessor of the pebble. How was the question to be determined? The answer to this query necessitated an amplification of the prior conventions. After such elaboration the compact or law was no longer that the prior possessor should have the pebble, but that he who *proved* prior possession should be entitled to it. Out of the difficulties which presented themselves in connection with this proof, the rule became more and more involved; the right to the pebble came to depend not only upon proof of the prior possession, but upon proof of a certain kind or character, by certain persons or documents and before a given court or body of men.

It is not material to our present discussion to consider how these conventions or rules came into being, or how they gained the force of authority as law — whether the "Social Compact" theory of Locke accounts for them, whether mere custom is sufficient to explain their origin, or whether they grew up in some other way. It is a matter of indifference here, whether they were voluntarily assented to by all the members of the political body or whether the assent of some of them was compelled through the superior force of others. The essential fact is that, in some way or other, these rules of conduct came to be assented to and acquired controlling force.

Thus, our "rights" are only the creatures of these compacts or rules of conduct. We have a "right" because a particular item of the conventions or laws limits the action of the rest of the world in connection with the subject. In the very nature of things, these "rights" must be as artificial as the society out of which the compact or laws have sprung. The agreed rules of conduct which govern our correlative "rights" and "duties" and which find their definition in our laws, are of no different origin and character from those controlling the less important matters of purely social intercourse. No one can doubt the entire artificiality of the convention that men shall wear trousers instead of skirts. And there should be no less uncertainty as to the character of our laws' foundation. In a word, our laws, like our social customs, are only the self-imposed rules of the game we have agreed to play.

The players of what we ordinarily consider a game expect to abide by the rules they have agreed to for the government of the play under all circumstances. If such rules provide for a penalty when certain things occur, no one can object to the imposition of the penalty when the agreed facts arise. Of course, there may be laudable feelings of generosity on the part of any player which prompt him to waive the advantage the agreed penalty gives him; but no one has any just cause for complaint, so far as concerns the rules themselves, if his fellow stands on the rules agreed to by all the players and demands an exact compliance with them. The converse of the proposition is true, too. No one can demand the penalty unless all the stipulated circumstances occur. It is only when they exist that the penalty can be exacted.

The same is true in the more serious "game," for the regulation of which our laws are designed. Every one is entitled to shape his conduct on the exact rules agreed to by himself and his fellows through their association in the body politic which has formulated the rules into "laws." I say "entitled": naturally, many follow the higher ideal, and refuse to take advantage of the letter of the law when it seems to work unjustly. But of that later. The point now is that, under the rules of the body politic heretofore formulated into "laws," every man has the right to insist that no one shall demand anything more of him than precise compliance with the agreement and that he shall be subjected to no pains and penalties other than those "nominated in the bond."

When we translate these generalities into particularities in the realm of the administration of our laws by the courts, we find the

layman aghast. When he is told that it is the absolute right of a man who has deliberately broken his contract to be immune from any penalty therefor until the fact of the breach and the *quantum* of damages sustained thereby have been established in a certain tribunal, by certain kinds of proof and with a reasonable degree of certainty, the natural rebellion against the failure of the ideal causes a vigorous expression of dissatisfaction. When it is made clear to him that the guiltiest murderer is entitled to insist upon the state's attorney proving his guilt beyond a reasonable doubt according to well-established rules of evidence before his life can be taken as punishment for the crime, he is even more rebellious against the conditions which prevail. Why? Solely and simply because he has failed to realize that our laws are the "rules of the game" of our political and social life, and because he has neglected to acquire an accurate knowledge of such rules.

If he had such realization and knowledge, he would not attribute improper motives to the judge and lawyer who coöperate in securing a fair trial to the murderer or contract-breaker. He would see that they were simply keeping the oath they each had taken, to do as much as in them lay to secure the proper administration of the laws of the land. The legally trained mind cannot escape the fundamental idea, acquired all through the professional training, that the law is the agreed rule of conduct, and is to be administered *as it exists*, without any respect for persons, whether *pro* or *con*. Where it gives an advantage of some sort to a man who, viewing the matter from our highest ideals of justice, ought not to have such advantage, it is, nevertheless, to be followed and administered. It is a rule of the game to which we have all agreed in advance, and no one should be heard to say that it is not to be regarded as binding. Indeed, our ideal of justice prompts us to declare that it would be grossly improper to change any of the prearranged rules after the event. If it were suddenly agreed by three of the four players at a game of bridge that, in order to "work justice" in a certain hand which had been played and in which one or more of the players had "revoked," the established rule requiring one to follow suit was to be regarded as abolished in determining who had won the odd trick, we all would agree, I think, in deeming the fourth man sorely aggrieved. Yet there is no difference in principle between such a case and a refusal to administer our laws impartially where they seem to work injustice. And the lawyer and judge who assist the most abandoned criminal

in getting whatever "rights" he has under the laws as they exist, ought not to be the target of the unthinking attack which so often gains well-nigh universal assent and approbation.

So far as his individual conscience goes, he is only doing what he swore he would do when he ascended the bench or was admitted to the bar. Is he to be condemned for doing that? But, our earnest layman objects, he is furthering injustice. Is he, though? Let us consider that for a moment.

We have already agreed that our standard of justice is an ever-varying one, with vast differences of opinion on the subject. But let us assume that, in the particular case under consideration, we all would declare, with one accord, that the result which a rigid administration of the existing law requires, *does* effect an undesirable result. Can it be said that, even on such an assumption, the lawyer or judge is "furthering injustice" if he adheres strictly to the law as it is, and either succeeds in bringing about such result, or (in the case of the judge) directs it? *Ex hypothesi*, he does in the particular case, but his horizon ought to be much larger than that. He ought to consider what will be the effect of any departure from the established rule of conduct on those who are striving to shape their life in accordance with such rule. If the rule is departed from once, to work what the individual lawyer or judge or even all the world regards as justice in a particular case, is there any reason why we shall not assume that there will be another departure from it; and, if so, will it not be more radical than its predecessor?

The truest and broadest justice consists in the unswerving administration of the rules of the game as we have agreed upon them. We each may suffer at times because our limited human brains have not formulated the rule in a shape sufficiently comprehensive to effectuate our object. Then let us modify the rule in respect of our future conduct; but we ought not to seek to evade the rule we have agreed upon so far as it affects past matters. Where there is any such evasion, the grossest injustice results because of the inability of any member of the community to govern his conduct according to any rule. He does not know what the rule is, or, rather, what it will be declared to be.

In our strivings toward the attainment of the idealistic justice we have in our hearts, centuries ago we set up a "keeper of the king's conscience." It was to be his duty and prerogative to ameliorate the rigid and unswerving administration of the fixed "rules of the

game," where the king, in his capacity of a beneficent *parens patriae*, could see that injustice would result from a judgment in accordance with those rules. This chancellor was to decide disputes "according to natural justice and equity." He was to be bound by no hard and fast rules. In short, he was to be the embodiment of our cherished ideal of justice. Nothing has ever demonstrated the impossibility of attaining this ideal—at least while human nature is as frail and fallible as it has been up to this time—so conclusively as the history of the development of this "keeper of the king's conscience." Beginning with no fixed rules governing his administration of the "king's conscience," except that of doing "natural justice and equity," at the present time we find this "conscience" as entirely controlled by rule and rote as the courts of law. While the rules applicable in a court of equity (as the court of the chancellor has come to be called), differ somewhat in substance from those governing a court of law, there is not a shadow of distinction in respect of the rigidity of the rules. Equity has become as ossified as the law. A learned judge has recently expressed this most forcefully; he says:

"Courts of equity act on fixed principles, and in this respect their authority is no more to be arbitrarily exercised than is the authority of courts of law. These principles emanate from natural or intuitive justice, and are necessarily of general application, to which particular cases must be made to conform. A court of equity, therefore, must move within these principles and adhere to them, lest the condition of the law be one of uncertainty and chaos, whereby those desirous of conducting themselves according to law are prevented from knowing what the law is and of regulating their affairs by its demands and commands."

Another jurist says:

"While some courts, in the eager desire for justice, have carried their rules quite far . . . , there is often great danger of forgetting that there is virtue and truth in the maxim that 'Hard cases are the quicksands of the law.' There is, in all such instances, great danger of the courts drifting entirely away from the fundamental grounds upon which a rule of equity is builded, and getting out upon the wide sea of adventure without chart or compass. While rules and principles of equity jurisprudence are constantly expanding, in the aspiration for justice in the administration of law by the courts, they should never forget that 'the sprout is to savour of the root and go the same way.'"

It would seem, therefore, that the very structure of our society and body politic drives us, even against our will, back to the precisely formulated and rigidly administered "rule of the game." Up to this time our ingenuity has not been able to devise a means of working toward our ideal of justice in any other way. And no one has been able to suggest any other mode of procedure which seems better adapted to our end.

The logical course is to accept the situation and work toward our goal along the path apparently marked out for us. Let us realize that the agreed rule is to be the rule under any and all circumstances, and that the exact application of it, even where it works what seems to us injustice in a given case, is the course best adapted to the attainment of our ideal because it will drive us to such a modification or restatement of the rule as will embody in it the elements necessary to accomplish the justice we seek in all cases. The course of some judges, in seeking to stretch the rule so as to prevent what they regard as an unjust result in any given case, is thus, in the long run, most injurious: it precludes exact knowledge of what the rule is; if the rule is inartificially or inadequately formulated, it retards the process of reformation. It has produced more injustice than all the "hard cases" since the world began, because of the confusion and uncertainty it has injected into our system. The sagacious person, seeking antecedently to make his conduct conform to the rule, is unable to do so because he cannot ascertain what the rule is. As a result, despite all his care and desire to act properly, he is adjudged to have contravened the rule. Surely, no injustice is equal to this!

Respect for the rules as they have been established, and the duty to assist in their exact execution do not, however, in any degree suspend or modify the higher law, "to deal justly." Above all the rules of conduct which we have framed for our governance in the political or social body, is the requirement that a man shall "to his own self be true." When the individual conscience dictates a certain line of conduct which involves the relinquishment of a "right" given under the law, nothing in this article is intended to intimate that the "right" ought to be insisted upon. But that is a matter of individual conscience — of what a man requires of himself. It does not involve compulsion by his fellows.

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RECOVERY FOR GOODS SOLD BY AN ILLEGAL COMBINATION. — A highway robber may safely retain his partner's share of the booty, for the law leaves parties to an illegal transaction in the situation it finds them.¹ The robber is thrown out of court, not because he is a professional law-breaker,² but because he is attempting to enforce an unlawful agreement. To justify withholding legal redress, then, from an applicant "trust," it must not only appear that the plaintiff is or represents a combination created and usually acting in illegal restraint of trade, but the particular right sued on must have arisen from, be incidental to, or directly further, the illegal scheme.³ Thus, that the plaintiff is a "trust" is no defense to suits for infringement of a patent,⁴ to foreclose a mortgage,⁵ to enforce a surety liability,⁶ to recover possession of property once acquired under an unlawful contract,⁷ to reach the proceeds of sales in the hands of an agent,⁸ and to recover for services rendered,⁹ and for goods sold.¹⁰ Apparently it is not sufficient that the con-

¹ *Everet v. Williams*, 9 I. Quar. Rev. 105, 197.

² *Taylor v. Bell Soap Co.*, 45 N. Y. Supp. 939. But cf. *Jackson v. Akron Brick Assoc.*, 53 Oh. St. 303, where the statute permitting a partnership to sue in its own name was construed not to include an illegal partnership.

³ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

⁴ *Strait v. Nat'l Harrow Co.*, 51 Fed. 819; *Gen'l Electric Co. v. Wise*, 119 Fed. 922; *Am. Soda Fountain Co. v. Green*, 69 Fed. 333.

⁵ *Dickerman v. Northern Trust Co.*, 176 U. S. 181.

⁶ *Globe, etc., Co. v. Leach*, 19 Ky. L. Rep. 1287.

⁷ *Cal. Cured Fruit Assoc. v. Stelling*, 141 Cal. 713.

⁸ *McCausland Bros. v. Akers*, 24 Oh. Circ. Ct. R. 711.

⁹ *The Chas. E. Wiswall*, 86 Fed. 621.

¹⁰ *Connolly v. Union Sewer Pipe Co.*, *supra*; *Nat'l Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; *Wiley v. Nat'l Wall Paper Co.*, 70 Ill. App. 543. See *Chattanooga, etc., Works v. Atlanta*, 203 U. S. 390, 397.

tract alleged to be invalid (to restrict the discussion to contracts) was made in the course of the trust's usual business, however unlawful the trust or the business; the contract requires more direct contact with illegality to be tainted.¹¹

Some light on this necessarily vague topic is thrown by a recent holding of the Supreme Court. The plaintiff trust had contracted with the defendant jobber to sell, and the jobbing company had agreed to buy, all the wall-paper required by it in its business for a year, subject to prices and terms specified. The defendant gave several orders, which were filled, but when sued for the price pleaded illegality, and was sustained by a majority of the court. *Continental Wall Paper Co. v. Voight & Sons Co.*, U. S. Sup. Ct., Feb. 1, 1909. A previous holding⁸ is distinguished on the ground that there the purchaser was under no general contract to buy, and hence the specific sales sued on had no direct connection with an illegal contract or scheme. This distinction suggests two tests: that a contract will not be enforced when the plaintiff's case must disclose an unlawful transaction,¹² or when the contract is an inseparable part of such a transaction. The former has been justly criticized as too narrow;¹³ thus it is immaterial in the principal case that the plaintiff must refer to the previous unlawful contract for terms and prices, as is pointed out by the minority. But the minority opinion goes on broadly to state that a purchase may be lawful though it is the fulfilment of an unlawful contract, in other words, that the sales in question were not bad "from the outside." This is not the way the Supreme Court treats separate sales when the question is whether they constitute interstate commerce; then the single act is said to derive its flavor from the nature of the whole congeries.¹⁴ Perhaps a sale may constitute an element of actionable damage as a tortious act, and yet be in itself a valid contract.¹⁵ Nevertheless when, as in the principal case, the specific contracts were contemplated by, are the fulfilment of, and are connected as parts of an entire scheme to the previous unlawful agreement, it is hard to agree with the minority. The test of separability is indeed vague, but it seems certain enough to invalidate the contracts in question. On this ground, that the court could not help the plaintiff without furthering an illegal scheme,¹⁶ a trust was not allowed to sue for infringement of a patent,¹⁷ to replevy property,¹⁸ or to recover the price of goods sold.¹⁹ Nor should the court in deciding the legality of such contracts of sale consider the irrelevant facts that the plaintiff will have no quasi-contractual alternative,²⁰ that the defendant has received the benefits,²¹ or that an innocent defendant might recover against the trust in the converse case.²²

¹¹ Wald's Pollock, Contracts, 3d ed., 490, *n.* 50; 1 Page, Contracts, § 540.

¹² Robson v. Hamilton, 41 Ore. 239; Springfield Insurance Co. v. Hull, 51 Oh. St. 270.

¹³ Wald's Pollock, Contracts, 497, *n.* 56. See Johnson v. Hulings, 103 Pa. St. 498.

¹⁴ Montague & Co. v. Lowry, 193 U. S. 38; Swift & Co. v. United States, 196 U. S. 375; Aikens v. Wisconsin, 195 U. S. 194.

¹⁵ See Chattanooga, etc., Works v. Atlanta, *supra*.

¹⁶ Cf. Thomson v. Thomson, 7 Ves. 470; Snider v. Udell Woodenware Co., 74 Miss.

353. ¹⁷ Nat'l Harrow Co. v. Hench, 84 Fed. 226; Same v. Quick, 67 Fed. 130.

¹⁸ Bishop v. Am. Preservers Co., 157 Ill. 284.

¹⁹ Arnot v. Pittston, etc., Coal Co., 68 N. Y. 558; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232. Cf. Carrington v. Callier, 2 Stew. (Ala.) 175.

²⁰ Scott v. Brown, etc., Co., [1892] 2 Q. B. 724.

²¹ Contra, Nat'l Wall Paper Co. v. Hobbs, 90 Hun (N. Y.) 288.

²² Carter-Crume Co. v. Peurrung, 86 Fed. 439. But cf. Clancey v. Onondaga, etc., Co., 62 Barb. (N. Y.) 395.

STATE REGULATION OF INTERSTATE COMMERCE.—The difficulties attending any exact division of power where the state and federal governments have concurrent jurisdiction are nowhere more apparent than in the cases involving the state control of interstate commerce. Chief Justice Marshall in 1824 first established the supremacy of the federal power to regulate interstate commerce, under the "commerce clause" of the Constitution,¹ but his decision did not embrace the right of the several states to act during the inaction of Congress.² On this point many and varying views were expressed,³ and no general principle was definitely formulated until 1851. In that year the Supreme Court recognized that the power of Congress to regulate commerce between the states includes many subjects, some imperatively demanding a uniform rule, and some that are in their nature local and may be regulated by the states during the non-action of Congress.⁴ Since that decision state regulation has generally been exercised through the agency of two functions of government, the taxing power and the police power.

No state can compel an individual or corporation to pay for the privilege of engaging in interstate commerce within its territory, this being a direct burden.⁵ But a state may impose ordinary property taxes on property having a *situs* within its territory, although that property be employed in interstate commerce, for the burden in such a case is incidental;⁶ and this power includes a tax on the corporate franchise.⁷ The fact that a company is engaged in interstate commerce does not, however, relieve it from a charge for all property expropriated for its own use.⁸ The only burden, then, that the state can impose by taxation is that which is primarily of a local nature.

A more frequent subject of litigation is as to the exercise by the state of its police power. This is usually exercised with respect to matters that concern the public health, safety, or morals; but it includes the control, so far as it becomes necessary for the protection of the public interest, of corporations engaged in the public service.⁹ Thus, a regulation that all locomotive engineers shall pass a state examination as to their ability to distinguish colors is evidently primarily intended to safeguard the citizens of the state, and is not in conflict with the "commerce clause."¹⁰ And much of the difficulty in determining more intricate cases may be eliminated if it be borne in mind that the states never intended to delegate their entire power of making regulations concerning the rights, duties, and liabilities of their citizens, but simply gave to Congress the power to make these regulations uniform in so far as they should affect interstate commerce.¹¹ So a state may forbid the running of freight trains on Sunday,¹² or may provide that carriers cannot by contract relieve themselves altogether of their common law

¹ Art. I, § 8.

² *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

³ See *The License Cases*, 5 How. (U. S.) 504; *The Passenger Cases*, 7 How. (U. S.) 283.

⁴ *Cooley v. The Port Wardens of Phila.*, 12 How. (U. S.) 299.

⁵ *McCall v. California*, 136 U. S. 104.

⁶ *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194.

⁷ *Western Union Telegraph Co. v. Gottlieb*, 190 U. S. 412.

⁸ *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92.

⁹ *Munn v. Illinois*, 94 U. S. 113.

¹⁰ *Nashville, etc., R. R. v. Alabama*, 128 U. S. 96.

¹¹ *Sherlock v. Alling*, 93 U. S. 99, 103.

¹² *Hennington v. Georgia*, 63 U. S. 299.

liability for loss.¹³ In a recent case it was held that a shipper against whom a carrier had discriminated might bring *mandamus* in a state court to compel the railroad to perform its common law duty.¹⁴ *Mo. Pac. R. R. v. Larabee Mill Co.*, 29 Sup. Ct. Rep. 214 (Jan. 11, 1909). The court distinguishes another recent decision¹⁵ on the ground that there a direct burden was imposed on interstate commerce, while in the principal case the state was merely exercising its police power in a manner that incidentally burdened such commerce. A further distinction would seem to appear in that in the McNeill case the regulation was made by a state board, while the Interstate Commerce Commission was created to make just such regulations; so Congress could fairly be said to have acted, thereby excluding action by such state board.

THE LAW OF THE CASE. — In a recent case it was held on a second appeal to an intermediate court, after the former appeal had resulted in a remand for a new trial under certain rulings, that the trial court erred in following an intervening decision of the highest court inconsistent therewith. *District of Columbia v. Brewer*, 37 Wash. L. Rep. 65 (D. C., Ct. App., Jan. 5, 1909). While the inferior courts would, of course, be bound by such decision in subsequent cases, the opinion holds that the rulings are final as to the case in which they are given in the intermediate and trial courts. This is an application of the so-called doctrine of *the law of the case*, a doctrine that the rulings of a court of last appeal conclusively settle the law as to the case in which they are given, not only in the lower courts, but also in the court giving them. The principal case applies it to the rulings of an intermediate court when that is the last court to which appeal is taken. And the rule is supported by the weight of authority to that extent.¹

For orderly procedure inferior courts must be bound by the decision of their supreme court in the particular case. But the situation becomes somewhat startling when the supreme court applies the rule to itself and refuses on subsequent appeal to correct its former mistakes. The explanation is that a suit must be ended somewhere, and that it seems worth while to curtail litigation at the expense of a misdecision in isolated cases. Whether this should extend to the rulings of the last intermediate court to which appeal is prosecuted seems to depend on whether the defeated party by accepting a new trial on the basis of those rulings has lost his right to appeal therefrom. If he has not, the rule does not logically apply, because it rests on the ground that the holdings in question are the last word in the case on that issue, and the only practical result of its application would be to force the parties to further proceedings to attain precisely the same result. If he has, the decision of the intermediate court stands on the same footing

¹³ *Chic. Milw. & St. P. R. R. v. Solan*, 169 U. S. 133.

¹⁴ Mr. Justice Holmes concurred on the ground that the cars had not yet been appropriated to interstate commerce. *Cf. Norfolk & W. R. R. v. Comm.*, 93 Va. 749.

¹⁵ *McNeill v. Southern R. R.*, 202 U. S. 543, which held unconstitutional a regulation imposed by a state railway board, that certain classes of freight should be delivered to the consignees on spur tracks.

¹ *Ogle v. Turpin*, 8 Ill. App. 453; note in 34 L. R. A. 321-347; 26 Am. & Eng. Encyc., 2 ed., 184.

as the decision of a court of last appeal. There is a conflict in practice whether the right of appeal is thus lost.² It certainly expedites matters to deny the appeal, and while there is unquestionably hardship to the one party in denying it, there is also hardship to the other in allowing it; for he is thereby subjected to unnecessarily protracted litigation.

There is vigorous dissent from the rule in several states,³ which point out that courts waver between *stare decisis* and *res judicata* as the basis for the rule, and contend that it cannot be supported on either—not on *stare decisis*, because the former holding is absolutely conclusive; not on *res judicata*, because the rule is applied where, as in the principal case, no judgment is given, and the case is merely remanded for a new trial. Obviously the doctrine has nothing to do with *stare decisis*; for admittedly the court would repudiate its holding if it were proffered in another case. And, equally obviously, a matter cannot be *res judicata* unless there has been a judgment. But it is not conceived how the higher court can reverse the decision of the trial court and remand the case for a new trial without adjudicating anything. The adjudication may be on a question purely of law; and so it has been said that, since *res judicata* depends on estoppel and since there can be no estoppel on a question of law, the doctrine again falls from that basis.⁴ *Res judicata*, however, does not depend on estoppel:⁵ it means simply that the judgment of the court has settled the case between the parties, and there is no good reason why it should not apply to an issue of law.

THE ENGLISH VIEW OF CAPACITY IN INTERNATIONAL MARRIAGES. — In the light of the adjudged cases and the language used in deciding them, it is difficult to say whether an English court will apply the *lex loci* or the *lex domicilii* to determine matrimonial capacity.¹ Professor Dicey² thinks that *Ogden v. Ogden*³ has lessened the authority of the sweeping *dicta* in *Sottomayer v. de Barros I*;⁴ but his recently issued book states the domiciliary law still to be supreme, with "possible doubtful exceptions."⁵ However, Lord Barnes, who delivered the judgment in *Ogden v. Ogden*, has lately decided, in words strongly favoring the *lex loci*, that a Hindu who marries an English girl in England cannot set up against the validity of the marriage a disability imposed upon him by the law of his caste. *Venugopal Chetti v. Venugopal Chetti*, 25 T. L. R. 146 (Eng., Prob. Div., Dec. 7, 1908).

It is noteworthy that here by no ingenuity can the alleged defect be twisted into one of form or ceremony,⁶ as to which all agree that the local law should

² *Sidenback v. Riley*, 111 N. Y. 560; *Geraghty v. Randall*, 18 Colo. App. 194.

³ *Hastings v. Foxworthy*, 45 Neb. 676. But see *Smith v. Neufeld*, 61 Neb. 699.

⁴ 18 HARV. L. REV. 389.

⁵ See Wells, *Res Adjudicata and Stare Decisis*, 1.

¹ See 15 HARV. L. REV. 382; 18 *ibid.* 226; 2 Beale, *Cas. Conf. Laws*, 41 ff.

² Dicey, *Conf. Laws*, 2 ed., 838.

³ [1908] P. 46.

⁴ L. R. 3 P. D. 1.

⁵ Dicey, *Conf. Laws*, c. xxvii.

⁶ Thus the adherents of the domiciliary doctrine explain *Simonin v. Mallac*, 2 Sw. & Tr. 67, and *Ogden v. Ogden*, *supra*, where the parental consents required by French law were lacking.

govern.⁷ Either the case stands for the principle that the local law should also govern capacity; or it falls under one or the other of Professor Dicey's illogical exceptions,⁸ namely, that an English marriage is not affected by the incapacity of the foreign party which does not exist in England,⁹ or that the English court will not recognize certain kinds of incapacity.¹⁰ The former exception seems to be the practical result of any doctrine of personal law as to capacity;¹¹ the latter illustrates the force of the suggestion that whichever theory of matrimonial capacity prevails in a given jurisdiction, many of the decisions will be exceptions based on the "distinctive national policy" of the forum.¹² Granted that, it remains to inquire which theory the English courts have adopted as the general rule.

Of the seventeen or so pertinent English decisions from the middle of the eighteenth century to date, a dozen appear to have applied the *lex loci*; but five of these may also be based on some point as to sufficient ceremony,¹³ four on the non-extraterritorial effect of statutes,¹⁴ and two, including the principal case, on Professor Dicey's above-mentioned exceptions;¹⁵ one weak *semble* survives.¹⁶ On the other hand, if the principle of the *lex loci* be the answer, four of the five cases apparently *contra* may be explained as applying an extraterritorial prohibition intended by the legislature;¹⁷ one strong case remains unreconciled.¹⁸ Hence, inasmuch as none of these precedents are likely ever to be overruled, it is submitted that the domiciliary theory expresses more accurately the present state of English law.

A point raised by counsel in the principal case, but not adverted to in the opinion as now reported, was whether the fact that Hindu law allows polygamy invalidated the marriage. The English courts have upheld a non-Christian monogamous marriage in Japan of an Englishman and a Japanese,¹⁹ but have refused to recognize the union celebrated abroad of an Englishman with a Mormon,²⁰ or with an African tribeswoman,²¹ the English domicile having been lost, on the ground that the court can deal only with a monogamous status. But if the place of celebration does not affect the validity of the status, it would follow that the principal decision is not consistent with these. Obviously, however, the court is right in protecting the English girl; the case exemplifies the tendency toward inconsistencies which the domiciliary doctrine involves. The best method of meeting the dilemma in this

⁷ *Kent v. Burgess*, 5 Jur. 166; *Herbert v. Herbert*, 2 Hagg. Cons. 263; *Lacon v. Higgins*, 3 Stark. 178.

⁸ Dicey, 628, 633.

⁹ *Sottomayer v. de Barros II*, L. R. 5 P. D. 94.

¹⁰ A monk incapable by the law of his domicile can marry in England. Dicey, 634, citing Co. Lit., 136 a. An Austrian Jew can marry a Christian in America, though incapable by Austrian law. 1 Wharton, Conf. Laws, 3 ed., 343.

¹¹ Cf. 2 Beale, Cas. Conf. Laws, 32 ff.

¹² 1 Wharton, Conf. Laws, § 165.

¹³ *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395; *Middleton v. Janverin*, 2 Hagg. Cons. 437; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54; *Simonin v. Mallac*, *supra*; *Ogden v. Ogden*, *supra*.

¹⁴ *Compton v. Bearcroft*, Buller N. P. 114; *Kynnaid v. Leslie*, 1 C. P. 389; *In re Bozzelli*, [1902] 1 Ch. 751; *In re Green*, 25 T. L. R. 222.

¹⁵ *Sottomayer v. de Barros II*, *supra*.

¹⁶ *In re Alison*, 23 W. R. 226.

¹⁷ *Brook v. Brook*, 9 H. L. Cas. 193; *Mette v. Mette*, 1 Sw. & Tr. 416; *In re de Wilton*, [1900] 2 Ch. 481; *Sussex Peerage Case*, 11 Cl. & F. 85.

¹⁸ *Sottomayer v. de Barros I*, *supra*.

¹⁹ *Brinkley v. Att'y-Gen'l*, L. R. 15 P. D. 76.

²⁰ *Hyde v. Hyde*, L. R. 1 P. & D. 130.

²¹ *In re Bethell*, L. R. 38 Ch. D. 220.

instance would be to reason that the parties intended a monogamous union, if any. The theory of the *lex loci* affords a simpler reason: the Hindu submitted to the law of England, that is, to monogamy.²²

HEIRLOOMS AND DISPOSITIONS OF PERSONALTY TO FOLLOW LIMITATIONS OF REALTY. — Future limitations of chattels personal may be effected in England by will, and in this country either by deed or by will.¹ The nature of the interest so created depends on the nature of the interest given the particular tenant. The early English cases held that a gift to A for life gave him the absolute title,² and that, consequently, any succeeding gift was executory, and so within the operation of the rule against perpetuities. But, as the law developed, it was seen that there was no reason why, on a gift to A for life, then to B in fee, B's interest should not be treated as vested: such accordingly became the English law,³ A enjoying the use and occupation only. This is probably the American law.⁴ Unfortunately, the law in England seems to have returned to its original conception, and B's interest is today treated as executory.⁴

Such chattels as are proved by special custom to go to the heir, and a very restricted list of particular chattels, like armor, pennons, ensigns of honor, are called heirlooms.⁵ They are transferable by the present owner during life,⁶ but a bequest can be avoided by the person to whom the realty has descended or been devised.⁷ They follow the rules of realty by operation of law. With this as a guide-post the English courts have decided that if ordinary, non-consumable chattels are given to go along with certain realty "as heirlooms," or "so far as the rules of law or equity permit," each succeeding life-tenant of the realty takes only a life interest in the chattels, and the absolute ownership vests in the first tenant-in-tail on his birth;⁸ for there can be no entail of personalty. In reality this is inconsistent with the theory that a gift for life of a chattel carries the absolute interest, since a book, picture, or kitchen chair is not made an heirloom by calling it one.⁹ It is either an established exception to the present English rule, or proves

²² The American courts recognize the marriage of white and Indian, despite the tribal custom of polygamy. 2 Beale, Cas. on Conf. of Laws, 80 n.

¹ Gray, Rule Perp., 2 ed., §§ 91, 88, 854. The law of North Carolina is *contra* as to deeds. Cutlar v. Spillar, 2 Hayw. (N. C.) 130. A recent writer believes that such future limitations in England can be created by deed as well as by will. Mr. David T. Oliver in 24 L. Quar. Rev. 347, 432.

² Bro. Ab., Devise, 13. For conflicting opinions as to the ancient reason for this, see 3 HARV. L. REV. 315; 14 *ibid.* 408.

³ 2 Bl. Comm. 398; Hoare v. Parker, 2 T. R. 376; 14 HARV. L. REV. 417-420. As to chattels real, see Gray, Rule Perp., 2 ed., § 817 *et seq.*

⁴ *In re Tritton*, 6 Morr. Bank. Cas. 250. But see 24 L. Quar. Rev. 431.

⁵ Williams, Executors, 10 ed, 545-549; 2 Bl. Comm. 17, 428; Corven's Case, 12 Co. 105. Cf. Hill v. Hill, [1897] 1 Q. B. 483, 494-496. Blackstone says the word is derived from the Saxon "loom," meaning limb or member, and so signifies a limb or member of the inheritance. 2 Bl. Comm. 427. Heirlooms should be carefully distinguished from fixtures.

⁶ 2 Bl. Comm. 429. See Cro. Car. 344.

⁷ Co. Lit., 18 b, 185 b; Tipping v. Tipping, 1 P. Wms. 730; Williams, Pers. Prop., 15 ed., 128.

⁸ Scarsdale v. Curzon, 1 J. & H. 40; *In re Fothergill's Estate*, [1903] 1 Ch. 149. The same rule applies to trust gifts.

⁹ See Gray, Rule Perp., 2 ed., § 363 n., explaining the difference between the legal and popular meaning of the word. Cf. Haven v. Haven, 181 Mass. 573, 578.

it unsound. The testator's intention, however, cannot extend beyond the first tenant in tail, for here the personalty and the realty must take different paths. On the tenant's death the one goes to his executor, the other to the next heir of the body.¹⁰

In order to prevent the separation where the tenant in tail dies during minority, a clause is often inserted suspending the vesting of the chattel title until such tenant becomes twenty-one. This provision is respected, and it does not of itself violate the rule against remoteness.¹¹ If the tenant has reached twenty-one, but predeceases the last life-tenant, the same undesired separation must occur. To prevent this the courts require a very clear expression of intention that the chattels are not to vest in a tenant in tail who has never had possession of the realty.¹² In a recent case the chattels were to be "used, held, and enjoyed" by the person for the time being entitled to the mansion house, and a tenant in tail under twenty-one was to have the "use and benefit" of them until the title vested on his majority. It was held not sufficiently clear that possession was meant to be a necessary incident to the vesting of title. *In re Lord Chesham's Trusts*, 25 T. L. R. 213 (Eng., Ch., Jan. 12, 1909). This seems rather severe, though in line with earlier decisions.¹³

COLLATERAL ATTACK UPON THE DECREE OF A PROBATE COURT. — The decree or judgment of a court can be collaterally attacked only when it has no jurisdiction over the proceedings involved;¹ otherwise the judgment or decree, however erroneous, is merely voidable by direct appeal.² Furthermore, this collateral attack on jurisdiction is allowable only when the record discloses the absence of jurisdiction:³ if the record is silent as to the necessary facts, jurisdiction will be presumed as a matter of law;⁴ and a statement of the facts in the record will be conclusive.⁵

By the prevailing opinion a probate court is one of general jurisdiction,⁶ and, properly speaking, there are two facts necessary to give it jurisdiction: (1) the testator or intestate must be dead; (2) and the particular probate court in question must be the one entitled to adjudicate. (1) If we apply the general rule of collateral attack to the first of these facts, we may have

¹⁰ See *Scarsdale v. Curzon*, *supra*; *Williams, Executors*, 10 ed., 549.

¹¹ *Christie v. Gosling*, L. R. 1 H. L. 279; *Martelli v. Holloway*, L. R. 5 H. L. 532; *Gray, Rule Perp.*, 2 ed., § 367, where the reason is given that the provision is applicable only to those who might otherwise have taken, viz., tenants in tail by purchase.

¹² *Potts v. Potts*, 3 J. & L. 353, 369; *In re Fothergill's Estate*, *supra*.

¹³ *Foley v. Burnell*, 1 Bro. C. C. 274.

¹ *In re Sawyer*, 124 U. S. 200; *Wetmore v. Parker*, 52 N. Y. 450.

² *White v. Crow*, 110 U. S. 183; *Comstock v. Crawford*, 36 Wall. (U. S.) 396, 403.

³ *Jester v. Spurgeon*, 27 Mo. App. 477.

⁴ *Huxley v. Harrold*, 62 Mo. 516, 523.

⁵ *Tucker, Treas. v. Sellers*, 130 Ind. 514; *Ward v. White*, 66 Ill. App. 155.

⁶ *The People v. Seelye*, 146 Ill. 189, 222. Where a probate court is considered one of inferior jurisdiction, the only difference in the matter of collateral attack is, that no presumption as to jurisdiction will arise when the record is silent: the necessary facts must affirmatively appear, or the decree will be void. When, however, the record avers the necessary facts or discloses the want of them, the effect is the same as with regard to the decree of a court of general jurisdiction. *The People v. Seelye*, *supra*. See *Carron v. Martin*, 26 N. J. L. 594; *Comstock v. Crawford*, *supra*.

the extraordinary spectacle of a statement in a probate decree that X was deceased upheld against collateral attack in the face of clear proof to the contrary—in the face, even, of the personal appearance in court of X himself.⁷ One court has, indeed, taken this stand.⁸ But the law unquestionably is, that proof that the supposed decedent was alive at the time of probate makes the probate decree absolutely void upon collateral attack, regardless of the state of the record.⁹ This is best regarded, it is submitted, as a departure from the technical rule of jurisdictional facts, taken to prevent gross and absurd injustice. It has, furthermore, been rested upon the ground that to vest title to a living person's property in an administrator is to deprive that person of his property without due process of law;¹⁰ but the English law reaches the same result, though the constitutional argument has no application.¹¹ (2) Whether the particular probate court has jurisdiction by reason of the residence of the deceased within its territory, is a jurisdictional fact of less weight than the fact of death. It has, however, been attempted to make the two of equal consequence by reasoning that if the testator did not die a resident within the territory of the court, then legally he was not dead so far as that court was concerned.¹² On the other hand it has been claimed that locality is not a jurisdictional fact at all, because locality of the court concerns only jurisdiction over the particular case, and does not destroy the court's jurisdiction over the *subject matter* of that class of cases, which is the determining factor.¹³ But neither of these views has prevailed, and the general rule applies: only when the deceased's non-residence in the county appears upon the record can the probate decree be collaterally attacked as void.¹⁴ Nor can the lack of assets within the county be a ground for collateral attack in the absence of its disclosure on the record;¹⁵ and, despite decisions to the contrary,¹⁶ the rule should be the same where the deceased at the time of his death neither resided nor left assets within the state—there is no sufficient basis for distinguishing this from a grant of probate by the wrong county of the state of the deceased.¹⁷

A recent dissenting opinion attempts to enlarge the class of probate jurisdictional facts to include the appointment as administrator of a person "legally competent." *Union Savings Bank & Trust Co. v. West. Un. Tel. Co.*, 86 N. E. 478 (Oh. Sup. Ct.). The same attempt has been made before.¹⁸ But the law is tending toward further limitation rather than ex-

⁷ See *Jochumsen v. Suffolk Savings Bank*, 85 Mass. 87.

⁸ *Roderigas v. East River Savings Institution*, 63 N. Y. 460, 467. This case is referred to as overruled in *Matter of Killan*, 172 N. Y. 554, 557.

⁹ *Jochumsen v. Suffolk Savings Bank*, *supra*. This case is distinguished on the basis of statutes in *Roderigas v. East Savings Institution*, *supra*, 475.

¹⁰ *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatchf. (U. S.) 1, 15; *Scott v. McNeal*, 154 U. S. 34.

¹¹ See *Allen v. Dundas*, 3 T. R. 125.

¹² *Olmstead's Appeal from Probate*, 43 Conn. 110, 118.

¹³ *Coltart v. Allen*, 40 Ala. 155. *Contra*, *Sumner v. Parker*, 7 Mass. 78; *Holyoke v. Haskins*, 9 Pick. (Mass.) 259. These Mass. cases are now rendered obsolete by statute. *Cummings v. Hodgdon*, 147 Mass. 21.

¹⁴ *Moore v. Philbrick*, 32 Me. 102.

¹⁵ *Estate of Shoenberger*, 139 Pa. St. 132 (record silent); *O'Connor v. Higgins*, 113 N. Y. 511 (statement of assets in record); *Crosby v. Leavitt*, 4 Allen (Mass.) 410 (lack of assets disclosed by record).

¹⁶ *Coltart v. Allen*, *supra*.

¹⁷ *Record v. Howard*, 58 Me. 225; *Hoes v. N. Y. N. H. & H. R. R. Co.*, 73 N. Y. App. 363, 371 (assets within the state expressly averred on the record).

¹⁸ See *Jordan v. Chicago & N. W. Ry. Co.*, 125 Wis. 581.

tension of the class of jurisdictional facts.¹⁹ It has been expressly held that it is for the court to decide to whom administration shall be entrusted; and that its action in the matter, however irregular, cannot be impeached collaterally.²⁰

EXTINGUISHMENT OF POWERS. — The subject of extinguishment of powers has suffered from a tendency to lay down as established this broad general proposition: that while powers appendant and powers in gross or collateral may be extinguished, a power *simply* collateral may not.¹ This classification, which represents the generally accepted idea of the present English law, is commonly supported on the theory that in the first two cases, since the donee has himself an interest, he may extinguish this interest; in the third case, since he has been given no personal interest in the exercise of the power, he may not extinguish it to the detriment of others.

It is interesting to see where this criterion of personal interest in the donee logically leads in the cases of powers in gross. Where the power is general, the donee has plainly an interest in its exercise, for he may appoint to himself. But when the power is special, the donee may clearly not appoint otherwise than among the specified class, and his own personal interest could not be furthered by the exercise of the power. Furthermore, if he attempts to further his own interests by agreeing to exercise the power in a certain way, such agreement, unless the benefit to himself be merely incidental or unsubstantial, is void.² It would therefore seem that if the criterion of interest is to be followed, the donee should not be allowed to extinguish a special power in gross. This test of personal interest in the donee supports the third proposition, that a power *simply* collateral may not be extinguished. All the cases, however, appear to be either of special powers of appointment or of powers of management: the crucial case of a general power of appointment vested in a person who is a stranger to the title has not arisen.

This logical application of the test rests on considerable support in the earlier law.³ It was applied by Preston, who classified special powers as powers of selection rather than as powers of appointment.⁴ Sugden, however, took the contrary view. He felt that if such special powers could not be extinguished by a fine the intention of many settlements to allow a provision to be made for all children whether living at the donee's death or not would be defeated.⁵ But it is difficult to see why any such intention could not have been adequately expressed in the settlement, and the abolition of fines and recoveries has swept away the very foundation of the argument.

The five English cases allowing the extinguishment of a special power in gross rested largely on the further reasoning that, though the donee could

¹⁹ See *Salter v. Hilgen*, 40 Wis. 363; *Coltart v. Allen*, *supra*; *Nichols v. Smith*, 28 N. H. 296.

²⁰ *Simmons v. Saul*, 138 U. S. 439, 452.

¹ Leake, *Digest Law of Property*, 386, 387.

² *Topham v. Duke of Portland*, 11 H. L. Cas. 32. But *cf. In re Radcliffe*, [1892] 1 Ch. 227; *Gilbert v. Stanton*, 2 Commonwealth L. R. 447.

³ See Sugden, *Powers*, 8 ed., 906, 907.

⁴ 2 Preston, *Abstracts of Conveyancing*, 261; 3 *ibid.* 399. See *Norris v. Thomson's Exors.*, 20 N. J. Eq. 489.

⁵ Sugden, *Powers*, 8 ed., 907.

not lawfully convey an estate in excess of his own, yet he could so convey tortiously, and should not by exercising his power subsequently be allowed to derogate from his own grant.⁶ But at the present day, when all conveyances are innocent, such reasoning has no place, since the exercise of a power in which the grantor has no interest cannot derogate from a conveyance which carries his interest.⁷ Neither have the English cases differentiated between powers to appoint by deed and powers to appoint by will: they have allowed both alike to be extinguished. The intention of the donor of the power is a cardinal consideration in the whole law of powers and is always to be carefully weighed.⁸ In all powers to appoint by will the donor has *ipso facto* expressed an intention that the donee should be free to exercise the power up to the day of his death. Equity recognizes that intention and refuses to aid the execution by deed of a power to appoint by will.⁹ Furthermore a donee of a power to appoint by will has no interest in the exercise of the power, for he cannot appoint to himself. Therefore, in spite of the dissenting opinion¹⁰ in a recent case, the incipient tendency¹¹ of American courts towards the view that such a power is inextinguishable appears to reach a result which is logically sound and which also effectuates the donor's intention. *McFall v. Kirkpatrick*, 86 N. E. 139 (Ill.)

LIBEL OF A CANDIDATE FOR ELECTION TO A PUBLIC OFFICE.—A communication made *bona fide* upon a subject matter, in reference to which the party communicating has a duty, is privileged, if made to a person having a corresponding duty, even though it be only a moral duty of imperfect obligation.¹ Although this proposition of Lord Campbell's has been generally accepted, the courts have reached different results in its application; and the diversity of opinion has been especially great on the question whether the rule should be applied to communications made to the public regarding

⁶ *West v. Berney*, 1 Russ. & M. 431; *Smith v. Death*, 5 Madd. 371; *Horner v. Swann*, Turn. & R. 430; *Bickley v. Guest*, 1 Russ. & M. 440; *Smith v. Plummer*, 17 L. J. Ch. 145.

⁷ *Learned v. Tallmadge*, 26 Barb. (N. Y.) 443. The validity of an appointment which is not in derogation of a grant, *e. g.*, an appointment after bankruptcy of the donee, is unquestioned. *Doe v. Jones*, 10 B. & C. 459; *Legett v. Doremus*, 25 N. J. Eq. 122.

⁸ *Cf. inter al.* *Sugden, Powers*, 58, 60.

⁹ *Story, Eq. Jurispr.*, 11 ed., § 97; *Reid v. Shergold*, 10 Ves. Jr. 370, 379.

¹⁰ The majority went off on a very dubious application of the Rule in *Shelley's Case* which made the power a power appendant, and hence extinguishable. But a dissenting judge considered that the donee had only a life estate; consequently that the power to appoint in fee by will was a power in gross, which was not extinguished by the conveyance in fee, as such conveyance only operated on her life interest and could not be an appointment, which could only be made by will. For a full statement of the facts of this case, see *RECENT CASES*, p. 456.

¹¹ *Learned v. Tallmadge*, *supra*; *Gaskins v. Finks*, 90 Va. 384; *Bentham v. Smith Cheves* (S. C.) Eq. 33; *Ruggles v. Tyson*, 104 Wis. 500; *In re Collard & Duckworth*, 16 Ont. 735. See also *Dorizac v. Public Trustee*, 13 New Zealand 538; *Williams, Real Property*, 18 ed., p. 371. *Contra*, *Thorington v. Thorington*, 82 Ala. 489; *Atkinson v. Dowling*, 33 S. C. 414; *Grosvenor v. Bowen*, 15 R. I. 549. The first two cases follow the English authorities without reasoning. See also *Norris v. Thomson's Exrs.*, 19 N. J. Eq. 307, where the class to whom the appointment was to be made joined with the donee in extinguishing.

¹ *Harrison v. Bush*, 5 E. & B. 344.

a candidate for election. In perhaps the majority of jurisdictions, although a candidate may be the object of fair comment and criticism based upon his known acts, the occasion is not privileged.² If the facts upon which the comment is based do not exist, the communicant is liable irrespective of his motives or belief.³ On the other hand, a minority hold with a recent Kansas decision that the occasion is privileged when the communication is made in good faith and with probable cause for belief.⁴ *Coleman v. MacLennan*, 98 Pac. 281. The matter alleged must relate to the fitness of the candidate for office,⁵ and facts as well as comment are covered by the privilege. In this feature lies the difference between the two views.

The case seems to come well within the letter of Lord Campbell's rule. One believing facts which, if true, show the candidate to be incapable or unfit for office is certainly under a moral duty to disclose those facts to the voters. Nor does the fact that the information is volunteered affect the question of privilege.⁶ When a communication concerning a candidate for appointment to an office is made to the person or body having the power of appointment, the occasion is very generally held to be privileged,⁷ and this in jurisdictions denying the privilege in the other case. The analogy is very close, the only difference being in the size of the class to which the communication is made. But it is argued that where the communication is made to the public at large, the voters, the damage done to the reputation of the individual would more than overbalance the benefit accruing to the public, and that a wider privilege would cause many to refrain from running for public office.⁸ But in a country like our own, where public offices are so generally elective, it would seem to be of the utmost importance that the electors should have every opportunity of hearing facts about the candidates, and that one who has information which he *bona fide* believes to be true should not be deterred from communicating it by a fear of incurring legal liability therefor. The danger from unwarranted attacks is done away with by requiring reasonable grounds for belief in the information conveyed.

Although it is frequently said that English courts are opposed to the more liberal rule, the question there may still be regarded as an open one. One early case seems to admit the privilege, although the decision went off on the ground of an excess in the manner of publication.⁹ All the later cases concern, not a candidate for election, but one who is already in office. In such a case those to whom the communication is made do not have the duty to vote; so that the application of Lord Campbell's rule is not so clear. Some cases in this country, however, do not make this distinction, arguing that even though it be the case of a man already in office, his continuance there is in the control of the people and that therefore they have a right to the information.¹⁰

² Post Publishing Co. v. Hallam, 59 Fed. 530.

³ Eikhoff v. Gilbert, 124 Mich. 353.

⁴ Briggs v. Garrett, 111 Pa. St. 404.

⁵ Express Printing Co. v. Copeland, 64 Tex. 354.

⁶ See Erber v. Dun, 12 Fed. 526.

⁷ Thorn v. Blanchard, 5 Johns. (N. Y.) 508; Weiman v. Mabee, 45 Mich. 484.

⁸ Post Publishing Co. v. Hallam, *supra*.

⁹ Duncombe v. Daniell, 8 C. & P. 222.

¹⁰ Palmer v. City of Concord, 48 N. H. 211.

RECENT CASES.

ASSIGNMENTS FOR CREDITORS — MARSHALLING ASSETS — NOT PERMISSIBLE TO PREJUDICE SENIOR CREDITOR. — The defendant purchased of the plaintiff's assignor in bankruptcy a stock of merchandise, furniture, and fixtures, both parties acting in good faith. Under a statute the sale of the stock was void against creditors of the vendor. The defendant paid, and secured the assignment of a mortgage on the stock, the furniture, and the fixtures. The plaintiff sought a decree confining the defendant to the furniture and fixtures for satisfaction of the mortgage. *Held*, that the plaintiff is not entitled to such a decree. *Adams v. Young*, 86 N. E. 942 (Mass.).

Where a conveyance has been set aside for actual fraud against creditors of the grantor, a grantee has been allowed to hold the property under a mortgage paid by, or assigned to, himself. *King v. Wilcox*, 11 Paige (N. Y.) 589. *A fortiori* a grantee merely constructively fraudulent receives like protection. If he pays the claims of secured creditors, he may be subrogated to their rights. *Cole v. Malcolm*, 66 N. Y. 363. Or if, as in the principal case, he secures an assignment of a mortgage, this will not merge, but will be upheld against the property. *Fordyce v. Hicks*, 76 Ia. 41. As the present defendant has a valid mortgage covering the stock, he should not be prevented from enforcing it. The doctrine of marshalling assets will never be applied when to do so would prejudice the senior creditor. *Detroit Bank v. Truesdale*, 38 Mich. 430, 439; *Wolf v. Smith*, 36 Ia. 454. Nor is it generally applicable unless both the funds upon which the senior creditor has a lien are in the hands of the common debtor. *Dorr v. Shaw*, 4 Johns. Ch. (N. Y.) 17. But *cf. Hodges v. Hickey*, 67 Miss. 715, 728. The principal case is therefore unquestionably sound in refusing to compel the creditor to apply his own property to the debt.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — EFFECT OF DISSOLUTION OF CORPORATION BY STATE DECREE. — A corporation voluntarily petitioned the state to accept the surrender of its charter. A state court granted this petition. Subsequently creditors of the corporation filed in the federal court a petition of involuntary bankruptcy against the corporation, stating that it was insolvent and had allowed certain preferences within four months. *Held*, that the federal court has jurisdiction. *In re Adams v. Hoyt*, 21 Am. B. Rep. 161 (Dist. Ct., N. D. Ga.).

Where an individual commits acts of bankruptcy and dies before a petition of involuntary bankruptcy is filed, the court will refuse jurisdiction, for it is given no jurisdiction over the estate of a deceased person. *Adams v. Terell*, 4 Fed. 796. The surrender of its franchise by a corporation is corporate death. 1 BL. COMM. 485. Logically, therefore, dissolution before a petition is filed should defeat the jurisdiction of bankruptcy courts. But where dissolution is merely incident to winding up the affairs of the corporation, its existence is extended for the purpose of satisfying the ends of justice. *Coal Co. v. Stauffer*, 148 Fed. 981. The decision considered follows a line of cases allowing a dissolved corporation to be adjudged bankrupt. *In re Munger*, 159 Fed. 901. The effect of corporate death, controlled by the corporation itself, is to deprive it of the power to set aside preferences, and dissolution in such circumstances is an act of bankruptcy. *Scheuer v. Book Co.*, 112 Fed. 407. If therefore dissolution were to deprive the bankruptcy court of jurisdiction, we should have a voluntary act of bankruptcy itself avoiding the effect of the bankruptcy act. The result reached here is thus clearly desirable.

BILLS AND NOTES — BANKS AND BANKING — DRAWEE'S LIABILITY TO DEPOSITOR FOR PAYMENT UPON FORGED INDORSEMENT. — The plaintiff drew a check upon Bank X and sent it to an agent with orders to give it to the payee, a creditor of the plaintiff. The agent forged the payee's name and

obtained payment on the check from Bank Y. He then deposited the money to his own credit in Bank Y. Later he drew out the money and paid it over to the plaintiff in satisfaction of a pre-existing debt to the plaintiff. The plaintiff now seeks to recover from Bank X the amount of the unauthorized payment. *Held*, that as the money belonged in conscience to Bank X, the agent could not discharge his debt with it; and that, as the agent's debt remains unpaid, and the proceeds of the original check have reached the plaintiff's hands again, the plaintiff has suffered no damage. *Andrews v. Northwestern National Bank*, 117 N. W. 621 (Minn.).

As Bank X, in the main case, reimbursed Bank Y for its payment to the agent, the agent in effect wrongfully obtained money from Bank X. Consequently he was a constructive trustee for Bank X of the claim against Bank Y acquired with the stolen money. *Newton v. Porter*, 5 Lans. (N. Y.) 416. When he realized upon this claim and paid over the proceeds to the plaintiff, the latter, by accepting the money in payment and discharge of a pre-existing debt from the agent to himself, became a purchaser for value. *Mechanics' Bank v. Chardavoigne*, 69 N. J. L. 256. And being also a purchaser without notice, the plaintiff acquired title to the money free of all equities. *Nassau Bank v. National Bank of Newburgh*, 159 N. Y. 456. See 19 HARV. L. REV. 55. In other words, the money paid to the plaintiff was not at all the property of Bank X, but the plaintiff's own property for which he had paid value. Therefore his loss through Bank X's payment on the forged indorsement was not cured by this payment from the agent; and he should have been allowed recovery to the full amount of the original check, under the rule making the drawee bank responsible to the depositor for payments upon forged indorsements. *Bank of British N. America v. Merchants' National Bank*, 91 N. Y. 106.

BILLS AND NOTES — CHECKS — DISHONOR OF CERTIFIED CHECK OBTAINED BY FRAUD. — A drew a check on the X bank payable to order of B. B had the check certified by X. Then B endorsed it to C in payment for a horse. C deposited the check properly endorsed in the Y bank. B discovered that C had obtained the check by fraud and notified Y of such fact. Y sued X on the check and, on an interpleader, B was substituted as defendant. *Held*, that Y may recover. *Blake v. Hamilton Dime Savings Bank Co.*, 87 N. E. 73 (Oh.)

By the certification of a check for the holder the drawer is discharged and the bank becomes debtor to the holder. *First Nat'l Bank v. Leach*, 52 N. Y. 350; *Willeys v. Phoenix Bank*, 12 Duer (N. Y.) 121. It is as if a negotiable certificate of deposit had been issued. See *Metropolitan Nat'l Bank v. Jones*, 137 Ill. 634. Though a check so certified circulates as freely as money, it remains merely the representative of so much money in the bank. See *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 647. Thus the acceptance of a certified check is not payment. *Mutual National Bank v. Rotgé*, 28 La. Ann. 933. In treating such checks as money the court apparently lost sight of this distinction. A purchaser for value without notice can collect such check, though it was stolen or obtained by fraud. *Nolan v. Bank of N. Y. Nat'l Banking Ass.*, 67 Barb. (N. Y.) 24; *Nassau Bank v. Broadway Bank*, 54 Barb. (N. Y.) 236. But it is submitted that against a holder without value or with notice these defenses should be valid. In the case of bank notes and certificates of deposit it has been so held. *Olmstead v. Winsted Bank*, 32 Conn. 278; *Dunn v. Bank*, 11 S. D. 305. In the United States the mere credit of a check to a depositor's account does not make the bank a purchaser for value. *Thompson v. Sioux Falls Nat'l Bank*, 150 U. S. 231. Therefore the main case seems a departure from true principle.

CONFLICT OF LAWS — MARRIAGE — VALIDITY OF FOREIGN MARRIAGE. — A Hindu, domiciled in India, where his personal relations were governed by the Hindu law, married in England a Christian woman there domiciled. The Hindu law forbade marriage outside of caste and religion, and allowed polygamy. *Held*, that the marriage is valid. *Venugopal Chetti v. Venugopal Chetti*, 25 T. L. R. 146 (Eng., Prob. Div., Dec. 7, 1908). See NOTES, p. 439.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — PORTO RICO AS TERRITORY. — The police commissioner of New York arrested a fugitive from Porto Rico, by proceedings under a statute which provided for the extradition of a fugitive from any state or territory. The prisoner sued out a writ of *habeas corpus*. *Held*, that Porto Rico is a territory of the United States, and therefore the prisoner is not entitled to release. *Kopel v. Bingham*, U. S. Sup. Ct., Jan. 4, 1909.

The word "territory," as used in the Constitution and laws of the United States, would seem to apply only to the possessions of the United States which have been given an organized form of government by acts of Congress. This view is supported by the decision that Oklahoma, before its organization, was not a territory. *In re Lane*, 135 U. S. 443. As opposed to other organized possessions, the insular possessions are not part of the United States, so far as the applicability of the Constitution is concerned. *Hawaii v. Mankichi*, 190 U. S. 197. See REV. STAT. U. S. 1878, § 1891. But Porto Rico is not a foreign country within the meaning of the tariff laws. *De Lima v. Bidwell*, 182 U. S. 1. Such a possession is properly termed a dependency, and it would seem that the Supreme Court has adopted this distinction. See *Rasmussen v. United States*, 197 U. S. 516, 521. However, although the term "territory" has usually been applied only to organized territories within the United States, the court reaches a very necessary and not illogical result in declaring an organized dependency to be a "territory" within the extradition statute.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REQUIRING CARRIER TO DELIVER CARS TO CONNECTING CARRIER. — The defendant railroad connected near its terminus with the Southern Railway, each having neighboring stockyards for the unloading of livestock. The stockyard of the Southern Railway sought to compel the defendant to receive cars of livestock at the place of connection and carry them to points of delivery on its line; and to deliver to the Southern Railway without transshipment cars sent from points on the defendant's line containing livestock consigned to the plaintiff. *Held*, that the state constitution, so far as it requires the defendant to do this, is invalid under the Fourteenth Amendment. *L. & N. R. R. Co. v. Central Stock Yards Co.*, U. S. Sup. Ct., Jan. 25, 1909.

In its public duties a railroad is subject to governmental regulation and may be compelled to provide reasonable facilities for the interchange of freight and allow connections with the tracks of another carrier. *Fitchburg R. R. Co. v. Grand, etc., R. R. Co.*, 4 Allen (Mass.) 198. Its rights are taken subject to the police power, but there must be a valid exercise of the power, and the question of the reasonable necessity of regulation is judicial. *Toledo, etc., Ry. Co. v. Jacksonville*, 67 Ill. 37. If it is arbitrary and unreasonable and infringes property rights, it is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. *Stone v. Farmers, etc., Co.*, 116 U. S. 307, 331. Hence a railroad cannot be compelled to furnish transportation of livestock without compensation therefor. *R. R. Co. v. Campbell*, 61 Kan. 439. Although it is obliged at common law to receive freight tendered for carriage by connecting carriers, it is under no duty either to receive and use the other carrier's cars or to allow its own cars to be used by other carriers. *Oregon Short Line, etc., Co. v. No. Pac. R. R. Co.*, 61 Fed. 158; *Central Stock Yards Co. v. L. & N. Rd. Co.*, 192 U. S. 568, 570-571. To compel it to do either seems invalid if, as here, no provision is made to protect it from the loss or detention of its own cars, and a sharing of its terminal facilities with the cars of others. Cf. *Mays v. Seaboard Air Line Ry.*, 75 S. C. 455; 20 HARV. L. REV. 494.

CONSTRUCTIVE TRUSTS — NATURE AND LIMITATIONS OF DOCTRINE — CONVEYANCE BY MISTAKE. — An owner of land executed a deed to the defendant which by mutual mistake included certain lots not intended to be passed. Three days later the same grantor executed a deed to the plaintiff

covering the property by mistake granted to the defendant. *Held*, that the defendant holds the land in trust for the plaintiff and must convey to him. *Lamb v. Schiefner*, 40 N. Y. L. J. 1495 (N. Y., App. Div., Jan. 8, 1909).

It is obviously inequitable that a grantee retain property not intended to be conveyed to him. As between the original parties equity will in such case either allow complete mutual restitution or convert the grantee into a constructive trustee of the property inadvertently passed, and order a reconveyance. *Brown v. Lamphear*, 35 Vt. 252. It has been declared in general terms that redress will also be given as between those claiming under the original parties in privity. 1 STORY, EQ. JUR., 13 ed., § 165. Privity in this connection has been variously interpreted. See *White v. Kingsbury*, 77 Tex. 610; *Farley v. Bryant*, 32 Me. 474. It is submitted that on principle and authority no narrower rule should govern than that applicable to the running of equities generally. *May v. Adams*, 58 Vt. 74. Thus conceived, privity may be based either upon assignment of the contract or upon succession to the property. By construing the common grantor's deed to the plaintiff as a transference of his beneficial interest, the court readily finds privity of estate. A desirable result is accordingly achieved by correct technical processes. See *Widdicombe v. Childers*, 124 U. S. 400.

CORPORATIONS — FEDERAL JURISDICTION — FORMATION OF NEW CORPORATION TO EFFECT DIVERSITY OF CITIZENSHIP. — A South Dakota corporation brought ejectment against a citizen of Georgia in the United States Circuit Court, claiming jurisdiction by diversity of citizenship. The plea showed that the plaintiff was not the real party in interest, but had been organized and was doing business that citizens of Georgia might use its corporate name in order to create an apparent diversity of citizenship, and so get into the federal courts. *Held*, that the action be dismissed, as an attempted fraud on the court's jurisdiction. *Southern Realty Investment Co. v. Walker*, U. S. Sup. Ct., Jan. 4, 1909.

This decision is the logical outcome of a number of similar cases, where the property in controversy was conveyed to a new corporation organized for the purpose of acquiring federal jurisdiction. The Supreme Court has uniformly dismissed these suits. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327; *Miller & Lux v. East Side Canal, etc., Co.*, 211 U. S. 293. The fraud is still more palpable where the cause of action is assigned, or where the name of the corporation organized for the fraudulent purpose is "borrowed." An assignment to an existing foreign corporation doing a legitimate business would probably be treated in the same way, since the transaction would be as much for the sole benefit of the real owner as in the case of a transfer of the property. However, a *bona fide* purchaser of the claim, or of the property, should, of course, be allowed to sue. For a discussion of the principles involved, and a consideration of the *Miller & Lux* case, see 22 HARV. L. REV. 290.

EQUITABLE CONVERSION — DEVOLUTION AFTER TOTAL FAILURE OF PURPOSES OF CONVERSION. — By a marriage settlement, real estate was conveyed by the settlor to trustees to the use of the settlor for life, and then to the use of trustees upon trust to sell for certain specified purposes. Afterwards, by his will, the settlor devised all his interest in these estates to his successor in fee. At the time of the settlor's death all the purposes for which conversion had been directed had failed. *Held*, that these estates devolve as realty under the testator's will. *In re Lord Grimthorpe*, [1908] 2 Ch. 675.

When real estate is settled upon trust to sell for certain purposes, the general rule is that the conversion takes effect as soon as the deed is executed. *Griffith v. Ricketts*, 7 Hare 299. Under this rule, the estates would be treated as personality from the time of the marriage settlement. Nevertheless, since the settlor possessed the entire beneficial interest at the time of his death, he was entitled to elect, as he did by his will, that the property should remain in the form of realty. See *Harcourt v. Seymour*, 2 Sim. N. S. 12; *Stead v. Newdigate*, 2 Meriv. 521. The court, however, obtained the same result by the less artificial

theory that since no one was ever entitled to enforce the sale, there was never any conversion into personalty. See *Davenport v. Colman*, 12 Sim. 610. The case would seem somewhat clearer if it were held that a conversion does not take place until the contingency upon which the sale is to be made has occurred. See *Paisley v. Holzshu*, 83 Md. 325. But see *Clarke v. Franklin*, 4 Kay & J. 257. Such a view would make applicable the rule, that there can be no conversion where all the purposes for which the conversion was directed have failed before the time when the conversion would otherwise occur. *Read v. Williams*, 125 N. Y. 560; *Smith v. Claxton*, 4 Madd. 484.

EQUITABLE CONVERSION — WHETHER SURPLUS PROCEEDS OF SALE OF LAND BY COURT DESCENDS AS REALTY OR PERSONALTY. — On A's death B became entitled to certain land. This land was subsequently sold by order of the court for the payment of the costs of settling the estate. After the sale B died intestate. *Held*, that the surplus resulting from the sale descends as personalty. *Burgess v. Booth*, [1908] 2 Ch. 648.

This decision reverses that of the lower court, criticized in 21 HARV. L. REV. 630.

ESTOPPEL — ESTOPPEL IN PAIS — FUTURE CONDUCT AS BASIS OF ESTOPPEL. — A sold land to B, taking a mortgage in part payment. B agreed to improve the land and to resell to A, who stipulated in the agreement that his mortgage should be subordinated to any mortgage which B might place on the premises to secure the payment of contemplated building loans. C, to whom B showed the agreement, made loans to B, and took a mortgage on the premises. Subsequently B released A from his subordination agreement. *Held*, that A, in seeking to foreclose his mortgage, is estopped to set up its priority. *Loudner v. Perlman*, 40 N. Y. L. J. 1439 (Dec., 1908).

In England a representation as to future conduct cannot form the basis of an estoppel. See *Jorden v. Money*, 5 H. L. C. 185, 214. In this country the tendency of the courts, expressed mainly in dicta, is to make an exception in cases where the representation relates to the intended abandonment of an existing right, if the representation is made to influence others and is in fact acted upon. *Insurance Co. v. Mowry*, 96 U. S. 544. In such cases equity should not aid the promisor in evading his undertaking. *Faxon v. Faxon*, 28 Mich. 159. But the decision here may be supported on another ground. In New York an agreement made for the benefit of creditors of the promisee gives them a vested right against the promisor when they show their consent by word or act. *Gifford v. Corrigan*, 117 N. Y. 257. In the case considered the legal remedy of C, the creditor, is distinctly inadequate, and equity, therefore, should grant him specific performance. *Hermann v. Hodges*, L. R. 16 Eq. 18. Then C's right to specific performance of A's agreement to subordinate his mortgage gives C an equitable defense in a foreclosure by A. *Randall v. White*, 84 Ind. 509.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BONDS — SURETY'S LIABILITY. — B, the executrix of X, found among the assets of the estate shares of stock which in good faith she inventoried. She sold them and applied the money to the purposes of the estate. It subsequently appeared that the stock had been paid for by X with forged bonds. A, a judgment creditor of X, sued B and her surety on their bond. *Held*, that since the executrix appropriated the money as part of the estate, the surety is liable on his bond. *Wiseman v. Swain*, 114 S. W. 145 (Tex., Ct. App.).

The surety on an executor's bond obligates himself only for the principal's faithful administration of the assets. *Campbell v. Sacray*, 19 Ky. L. Rep. 1912. Assets are such things as the executor may properly appropriate to paying debts and legacies. *Given's Case*, 34 N. J. Eq. 191. By the weight of authority trust funds coming into the hands of an executor are not assets of the estate, even though treated as such by the executor. *People v. Petrie*, 191 Ill. 497.

Contra, Matter of Hobson, 61 Hun (N. Y.) 504. The law is the same where rents are collected by the executor. *McPike v. McPike*, 111 Mo. 216. In the case considered, since the shares were acquired by the testator's fraud, the proceeds of their sale should be held by the executrix on a constructive trust. *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552. Clearly, then, the shares and their proceeds, which were incapable of being received by the executrix in her official capacity, cannot be regarded as assets. *Campbell v. Sacray*, *supra*. The decision, which would make the determination of what are assets depend on their treatment by the executor, is therefore difficult to support or reconcile with authority.

EXECUTORS AND ADMINISTRATORS—RIGHTS, POWERS, AND DUTIES—RIGHT OF SET-OFF AGAINST LEGATEES OR HEIRS.—The defendant was a beneficiary under the will of A and the residuary legatee under that of B. A debt due from B to A was barred by the Statute of Limitations. The trustees of A's estate took out a summons to determine the question of the defendant's liability to the estate. *Held*, that the defendant need not bring into account the amount of the debt as against his share of the testator's estate. *In re Bruce*, [1908] 2 Ch. 682 (Ct. App., Oct. 27, 1908).

For a discussion of this case in a lower court, see 22 HARV. L. REV. 143.

EXECUTORS AND ADMINISTRATORS—RIGHTS, POWERS, AND DUTIES—WAIVER OF STATUTE OF LIMITATIONS BY INTERESTED EXECUTOR.—A promissory note was barred by the Statute of Limitations before the maker's death. One of his executors, who was also one of the payee's heirs-at-law, made a payment as executor on account of the note. The payee's administrator brought a bill in equity to recover the amount of the note, to which the maker's other executor pleaded the statute. *Held*, that the note is barred. *Haskell v. Manson*, 39 Banker and Tradesman 264 (Mass. Sup. Jud. Ct., Jan. 7, 1909).

Many of those jurisdictions which allow an executor to waive the Statute of Limitations extend the rule so as to make a waiver by one co-executor binding upon the others. *Shreve v. Joyce*, 36 N. J. L. 44; *contra, Pitts v. Wooten's Executors*, 24 Ala. 474. Assuming that this extension is adopted, it is at least questionable whether it should be carried further so as to apply to claims in which the executor has an interest. An executor may waive the statute as to his own claims against the testator that were not barred at the time of the latter's death. *Preston v. Cutter*, 64 N. H. 461. As to those that were then barred, it has been said that the executor steps into the testator's place and so can revive claims held by him in his individual capacity. *Baker v. Bush*, 25 Ga. 594. But it is submitted that the executor steps into his testator's place solely for the purpose of protecting the estate. His duty being to use his discretion as to what barred claims are well founded and just, there is an obvious practical objection to allowing him this discretion in regard to a claim in which he is personally interested. *Batson v. Murrell*, 10 Humph. (Tenn.) 301; *Hoch's Appeal*, 21 Pa. St. 280.

GENERAL AVERAGE—NATURE, CAUSE, AND MANNER OF SACRIFICE—EFFECT OF INHERENT VICE OF CARGO UPON THE RIGHT TO CONTRIBUTION.—Y & Co. shipped coal upon G & Co.'s vessel. The cargo ignited by spontaneous combustion, whereupon water was poured into the hold, damaging the unburned coal. In respect to this damage Y & Co. claimed a general average contribution from G & Co. *Held*, that, in the absence of negligence on their part, Y & Co. are entitled to contribution. *Greenshields, Cowie & Co. v. Stephens & Sons*, [1908] A. C. 431.

A cargo of garbage tankage took fire by spontaneous combustion. The whole cargo of garbage tankage was destroyed in putting out the fire. The plaintiff insurance company had to indemnify the cargo owner and sued the vessel for a general average contribution. *Held*, that the plaintiff is entitled to contribution. *Atlantic Mutual Insurance Co. v. Schooner W. J. Quillan*, 40 N. Y. L. J. 2073 (U. S. Dist. Ct., S. D. N. Y., Jan. 1909).

The English case affirms the decision of the lower court discussed in 21 HARV. L. REV. 369. The question is now raised for the first time in this country by the New York case, which, in the consequent absence of authority, expressly defers to the above ruling by the House of Lords.

GIFTS — GIFTS INTER VIVOS — BANK ACCOUNT: INTENT TO MAKE PRESENT GIFT. — A deposited a sum of money in a savings bank and the following entry was made in the pass book: "A in case of death payable to B." A delivered the pass book to B and subsequently died. The bank filed a bill of interpleader, and B's claim of the deposit was denied on the ground that there had been no valid gift. *Held*, that there is not a valid gift to B. *Jones v. Crisp*, 71 Atl. 515 (Md.).

X deposited money in a savings bank in her own name. She lost her pass book, but obtained from the bank an order transferring the account to Y, which she indorsed and delivered to Y, stating that she gave this fund "subject to her own use during her lifetime." *Held*, that there is a valid gift to Y. *Candee v. Conn. Savings Bank*, 71 Atl. 551 (Conn.).

It is clearly settled law that a valid gift either *inter vivos* or *causa mortis* of a deposit in a savings bank may be made by a delivery of the pass book. *Camp's Appeal*, 36 Conn. 88; *Ridden v. Thrall*, 125 N. Y. 572. But there must be a clear intention on the part of the donor to relinquish immediately to the donee all control over the fund. *Bath Savings Institution v. Fogg*, 101 Me. 188. Thus, where A had a deposit put in the names of A and B, there was held to be no gift, since A would retain control during his life. *Schippers v. Kempkes*, 67 Atl. 74 (N. J.). The decision in the first case under consideration that there was no gift is therefore clearly correct, since, by the express terms of the deposit, B was to get no rights until A's death. And as a testamentary disposition such a gift is invalid under the statute of wills. *Augusta Savings Bank v. Fogg*, 82 Me. 538. But in the second case there was no attempt to make a testamentary disposition, and the reservation of a use for life, while it may presumptively, does not conclusively, negative an intent to make an absolute gift *in praesenti*. *Bone v. Holmes*, 195 Mass. 495.

GUARDIAN AND WARD — OPPOSITION OF WARD NO BAR TO ACTION BY GUARDIAN. — An infant sold personal property to the defendant. His guardian, against the infant's wishes, brought suit to recover possession of the property. *Held*, that the ward's opposition is no defense to the action. *Hughes v. Murphy*, 63 S. E. 231 (Ga., Ct. of App., Dec. 22, 1908).

The courts differ as to the guardian's right to his ward's real estate, some holding that he is entitled to the possession, others that he can only have the rents and profits. *Matter of Hynes*, 105 N. Y. 560; *Muller v. Benner*, 69 Ill. 108. But in most states either by statute or by common law he is entitled to the possession of his ward's personalty. *Walker v. Watson*, 32 Ga. 264. At common law an infant could only sue by next friend, but many statutes allow the guardian to sue without an appointment by the court as next friend. *Hutton v. Williams*, 35 Ala. 503. It follows that he can bring action for the possession of the ward's personal property. *Boruff v. Stipp*, 126 Ind. 32. A new promise by the guardian will revive a debt of his ward barred by the Statute of Limitations, when a promise by the ward will have no effect. *Manson v. Felton*, 30 Mass. 206. And a conveyance by the ward is no defense to an action for possession by the guardian. *Freeman v. Bradford*, 5 Port. (Ala.) 270. Since the reason for appointing a guardian is to substitute the discretion of an adult for that of an infant, the principal case seems rightly decided.

ILLEGAL CONTRACTS — CONTRACTS COLLATERALLY RELATED TO SOMETHING ILLEGAL OR IMMORAL — ACTION FOR GOODS SOLD IN FURTHERANCE OF AN ILLEGAL AGREEMENT. — The plaintiff corporation was formed in violation of the anti-trust laws, and made an unlawful agreement with the defendant to sell it all the paper required by defendant at specified prices. Accordingly,

the plaintiff made several sales to the defendant and sued for the balance of the price, on an account stated. *Held*, that the plaintiff may not recover. *Continental Wall Paper Co. v. Voight & Sons Co.*, U. S. Sup. Ct., Feb. 1, 1909. See NOTES, p. 435.

INSURANCE — MARINE INSURANCE — MEANING OF "PIRACY" IN POLICY. — Supplies for the plaintiff government, which were insured under a marine policy covering the risk of loss from piracy, were illegally taken by insurgents who, though not politically organized, were attempting to set up an independent government in Bolivian territory. *Held*, that this is not a loss by "piracy" within the meaning of the policy. *Republic of Bolivia v. Indemnity, etc., Assurance Co. Ltd.*, 126 L. T. 302 (Eng., Ct. App., Jan. 1909).

Piracy has usually been considered as robbery within the jurisdiction of the admiralty. See *Rex v. Dawson*, 13 St. Tr. 454. And depredating on the high seas without authority from any sovereign power is piracy by the law of nations, war being sanctioned among sovereign powers only. *The Ambrose Light*, 25 Fed. 408. However, a capture by a regularly organized *de facto* government, engaged in open and actual war against its enemy, and against its enemy only, is not piracy. *Mauran v. Insurance Co.*, 6 Wall. (U. S.) 1. But see *Dole v. Merchants', etc., Insurance Co.*, 51 Me. 465. Likewise vessels engaged in hostilities under an unrecognized government that has been treated as a belligerent are not pirates. *United States v. Palmer*, 3 Wheat. (U. S.) 610. According to the law of nations, there seems to have been a loss by piracy in the principal case. The court admitted this; but held, however, that the meaning of the word "piracy" in an insurance policy must be based on the popular understanding — that is, that a pirate is one who plunders indiscriminately for his own ends. See *Davison v. Seal-skins*, 2 Paine (U. S.) 333. This, it is true, seems to be the natural meaning of the word in a document used by business men for business purposes. See HALL, INTERNATIONAL LAW, 5 ed., 262.

INTERSTATE COMMERCE — CONTROL BY STATES — GENERAL DISCUSSION OF LIMITS. — A railroad refused to haul the plaintiff's cars from an adjoining railroad to a near-by town, although this service was performed for other mill owners. The plaintiff brought *mandamus* in a state court. *Held*, that the state court has jurisdiction. *Mo. P. R. R. v. Larabee Flour Mills*, 29 Sup. Ct. Rep. 214 (Jan. 11, 1909). See NOTES, p. 437.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — AGENT SELLING FOREIGN OWNED GOODS. — A city ordinance imposed a license tax upon persons soliciting orders for the sale of goods at retail. The defendant solicited orders by samples, sent the orders to his principal in another state and on approval of the orders received the goods, delivered them to purchasers and collected the price. *Held*, that the fact that the defendant was agent both to solicit orders and to deliver the goods and collect the price does not prevent the transaction from being interstate commerce. *City of Kinsley v. Dyerly*, 98 Pac. 228 (Kan.).

"The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce." *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489. It is the transportation of goods from one state into another which gives a transaction interstate character, and a contract which is a necessary incident of such transportation is exclusively within federal control. A tax on the privilege of selling is a tax on the goods themselves. *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609. The right to sell implies a right to sell through agents, and a local tax upon agents soliciting orders for a non-resident principal is invalid. *Asher v. Texas*, 128 U. S. 129. The right to sell further implies a right to deliver and collect the price. Hence an agent of a non-resident for this purpose is not subject to a local tax even though the goods are shipped to him in bulk. *Caldwell v. North Carolina*, 187 U. S. 622. Such a restriction is no

less invalid when the property in the goods does not pass until payment of the price. *American Express Co. v. Iowa*, 196 U. S. 133. That the same person is agent both in affecting the contract and in delivering is immaterial. *In re Spain*, 47 Fed. 208.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — COMMENT ON CANDIDATE FOR PUBLIC OFFICE. — A published an article in his newspaper derogatory to the character of B, a candidate for election to public office. B sued A for libel. *Held*, that the occasion is conditionally privileged. *Coleman v. MacLennan*, 98 Pac. 281 (Kan.). See NOTES, p. 445.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — INFORMATION SUPPLIED BY COMMERCIAL AGENCY. — The defendant company, a commercial agency, made a report to one of its clients, as to the plaintiff's financial condition. The report was not true, the agent of the defendant having maliciously falsified information which he supplied and on which the report was based, so as to injure the plaintiff. *Held*, that the plaintiff may recover. *Fitzsimons v. Duncan & Kemp Co.*, L. R. [1908] Ir. 483.

This decision is not inconsistent with the American rule. For a discussion of the principles involved, see 22 HARV. L. REV. 62.

LIFE ESTATES — PERSONALTY TO FOLLOW LIMITATIONS OF REALTY. — Certain chattels were given to be "used, held and enjoyed" by the person for the time being entitled to a certain mansion-house; but title to them was not to vest in a tenant in tail until majority, although such tenant was to have the "use and benefit" of them until that time. A tenant in tail attained majority, but died before coming into possession of the realty. *Held*, that the chattels go to his legal representative. *In re Lord Chesham's Trusts*, 25 T. L. R. 213 (Eng., Ch., Jan. 12, 1909). See NOTES, p. 441.

LIS PENDENS — APPLICATION TO NEGOTIABLE PAPER. — Coupon bonds containing recitals that they were issued by order of a county court in virtue of a statute were purchased by A, *bona fide* and for value. The bonds were in fact issued in excess of the amount authorized. In a suit on the coupons the state court denied recovery. B bought the bonds from A for value and without notice of the institution of this suit. B sued on the bonds in the federal court. *Held*, that he recover. *County of Presidio v. Noel-Young Bond & Stock Co.*, 29 Sup. Ct. Rep. 237.

A person who acquires an interest in property involved in litigation takes subject to the final judgment or decree, even though he pays value and has no notice of such suit. *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566. The grounds of judicial necessity on which this rule is based yield to considerations of public policy in favor of the free operations of commerce. See *Leitch v. Wells*, 48 N. Y. 585; 20 HARV. L. REV. 488. Hence the above rule of *lis pendens* does not apply to negotiable paper purchased before maturity. *Winston v. Westfeldt*, 22 Ala. 760. Municipal or county coupon bonds fall within this exception. *County of Warren v. Marcy*, 97 U. S. 96. And it is immaterial whether the bonds were issued before or after the commencement of the litigation. *Durant v. Iowa County*, 1 Woolw. (U. S.) 69; *Carroll County v. Smith*, 111 U. S. 556. But notice of the suit renders a purchaser of the bonds subject to its outcome. *Scotland County v. Hill*, 112 U. S. 183. Hence, as the court here holds, the former judgment in the suit on the coupons should not preclude recovery. Furthermore, a corporation, by recitals in its bonds that they were issued in accordance with statutory authority, is estopped to deny their validity as against a *bona fide* purchaser. *Evansville v. Dennett*, 161 U. S. 434.

NEW TRIAL — DOCTRINE OF THE LAW OF THE CASE. — After the Court of Appeals of the District of Columbia had remanded the case to the Supreme Court of the district for a new trial, the United States Supreme Court made a

decision in another case inconsistent with the rulings of the Court of Appeals. The lower court, instead of following the rulings of the intermediate court, adopted the rule laid down by the highest court. *Held*, on second appeal to the intermediate court, that this is error. *District of Columbia v. Brewer*, 37 Wash. L. Rep. 65 (D. C., Ct. App., Jan. 5, 1909). See NOTES, p. 438.

POLICE POWER — NATURE AND EXTENT — CONFLICT BETWEEN STATE AND FEDERAL POLICE POWER. — Under a federal statute the defendants were indicted for introducing liquor upon Indian land. The land was held by Indians in severalty as citizens of the United States, under a preliminary patent, but the federal government retained the legal title as trustee. *Held*, that the offense charged is solely within the police jurisdiction of the state government. *United States v. Sutton*, 165 Fed. 253 (Dist. Ct., E. D. Wash.).

Although the police power is usually exclusively exercised by the state government, the federal government may exercise this power as incidental to its protection of those interests over which it has control. *United States v. Camfield*, 167 U. S. 518. See *United States v. Dewitt*, 9 Wall. (U. S.) 41. From the separation of the two governments, however, it does not follow that the paramount sovereignty of the one excludes any police regulation by the other of the same subject matter. Thus police regulation by a state in excluding diseased cattle, and again in forbidding the running of freight trains on Sunday, has been upheld, although the effect of such legislation upon interstate commerce is apparent. *Missouri, Kansas & Texas Ry. v. Haber*, 169 U. S. 613; *Hennington v. Georgia*, 163 U. S. 299. In the similar problem of conflicting state and federal jurisdiction presented in the main case, it is conceivable that federal police regulation for the protection of the land might properly affect the inhabitants thereof. But inasmuch as the statute under which the defendants were indicted was solely a police regulation of the Indian inhabitants, the result reached is sound. *Matter of Heff*, 197 U. S. 488. But see *United States v. Mullin*, 71 Fed. 682.

POWERS — EXTINGUISHMENT OF POWER APPENDANT BY CONVEYANCE IN FEE BEFORE APPOINTMENT. — By a marriage settlement land was conveyed to a trustee to hold and pay the rents to a life tenant, and on her death to convey to the appointees or those taking in default. The settlement gave a general power of appointment by will to the life tenant, and the property, in default of appointment, to her heirs and assigns, and provided that on her death the trusts should cease and determine and that the appointees hold in fee simple absolute. The life tenant conveyed a fee to the defendant's grantor and subsequently appointed by will to the plaintiff. *Held*, that the life tenant takes an equitable fee by the Rule in Shelley's Case; that the power is consequently a power appendant and is therefore extinguished by the conveyance in fee. *McFall v. Kirkpatrick*, 86 N. E. 139 (Ill.). See NOTES, p. 444.

SURETYSHIP — CO-SURETIES — RIGHTS OF SURETY SIGNING NOTE AT REQUEST OF PRIOR SURETY. — The plaintiff and the defendant were sureties upon a promissory note for the sum of \$10,000. A transferee of the note obtained a judgment against the plaintiff for \$9,076.36, which the plaintiff paid. He then brought this action to recover the amount so paid. The first cause of action stated that the defendant, after signing as surety, requested the plaintiff so to sign, and that the plaintiff did so sign only at such request; the second, that the defendant assured the plaintiff that he would not, and should not, be subjected to any loss by reason of his signing. The defendant demurred to both causes of action. *Held*, that the demurrers should be sustained. *Chappell v. John*, 99 Pac. 44 (Colo.).

The right of one co-surety against another is limited to contribution for whatever sum he has paid in excess of his share. *Deering v. Winchelsea*, 2 B. & P. 270. As between themselves, each is a principal to the extent of his share of the joint and several debt, and the other is as to such share a surety. See

Bragg v. Patterson, 85 Ala. 233, 235. The co-sureties may, however, by a private agreement of suretyship between themselves, modify this relation. Thus, a contract of the one surety to indemnify the other who signed at his request will relieve the latter from liability to contribution, and enable him to recover the whole of what he is compelled to pay. *Blake v. Cole*, 22 Pick. (Mass.) 97; *Apgar v. Hiller*, 24 N. J. L. 812. The first surety, under such circumstances, puts himself, as to the second, in the situation of a principal for the whole debt and must hence bear the ultimate burden of the obligation. But, by the weight of authority, the request alone is not enough to make the second surety a surety for, and not a surety with, the other. *Bagott v. Mullen*, 32 Ind. 332; *McKee v. Campbell*, 27 Mich. 497. See *Byers v. McClanahan*, 6 Gill & J. (Md.) 250. *Contra*, *Turner v. Davies*, 2 Esp. 479. The present decision seems, therefore, sound, though the court might well have taken a more liberal view of the facts. See *Apgar v. Hiller*, *supra*.

TAXATION — EXEMPTIONS — ASSIGNABILITY OF EXEMPTION GRANTED TO CORPORATION. — The charter of the X railroad company exempted its property forever from all taxes, and provided that the company was to pay the state each year 3 per cent of its earnings. It was further stipulated that all its rights, privileges, and immunities should go to its assignees. The charter and franchises of the X company came by mesne assignments into the hands of the Y company. A statute subsequently increased the uniform rate of taxation on railroads to 4 per cent, and the state sought to enforce this tax against the Y company. *Held*, that the state may enforce the tax. *State v. Great Northern Ry. Co.*, 119 N. W. 202 (Minn.).

A state may limit its right to tax corporations and no subsequent statute can extinguish the exemption granted. *Dodge v. Woolsey*, 18 How. (U. S.) 331. Such immunity, if directed to particular lands, may be enjoyed by assignees. *New Jersey v. Wilson*, 7 Cranch (U. S.) 164. But exemption of other corporate property from taxation is not assignable in the absence of statutory direction, express or implied from necessary construction. This well established doctrine is based on the ground that every presumption is to be entertained against the surrender of the sovereign right to tax. *Turnpike Co. v. Sanford*, 164 U. S. 578. Where, as in the case considered, a corporation claims, not total exemption, but a more favorable mode of taxation than that prescribed by general law, the courts incline to apply the same rule. See *Kentucky Ry. Co. v. Commonwealth*, 87 Ky. 661. Under a strict rule of construction, the assignability of all "immunities" by the original charter does not satisfy the requirement that the legislative intention to forego the right of taxation must unambiguously appear. *Kentucky Ry. Co. v. Commonwealth*, *supra*. But see *Louisville Ry. Co. v. Palmes*, 109 U. S. 244. Under this view the result in the case considered is sound. The decision is interesting as upsetting the so-called Minnesota doctrine, voiced in numerous dicta, in such cases as this.

TAXATION — EXEMPTIONS — EFFECT OF SUBSEQUENT GENERAL LAW. — A testator devised property to trustees to establish a hospital, provided the legislature should grant a liberal charter. In accordance with the memorial presented by the trustees, the legislature granted a charter which exempted the hospital's property from taxation and authorized it to receive the property in question. A part of this property, from which only the income was used for the purposes of the hospital, was assessed under the subsequent General Tax Law of 1896. *Held*, that the assessment is invalid. *People ex rel. Roosevelt Hospital v. Raymond*, 40 N. Y. L. J. 2021 (N. Y., Ct. App., Jan. 29, 1909).

If the property had been conveyed merely in general reliance upon the exemption, it is well settled in New York that the General Tax Law would terminate the exemption. *Matter of Huntington*, 168 N. Y. 399; *People ex rel. Cooper Union v. Gass*, 190 N. Y. 323. But a distinction is made in the principal case, because the conveyance was directly induced by the promise of exemption. See *People ex rel. Cooper Union v. Wells*, 180 N. Y. 537. Such a distinction is likely to give rise to difficult questions of fact. It cannot be based

upon the existence of a contract, for the state had previously reserved the right to alter corporate charters. See N. Y. CONST. (1846) Art. VIII, § 1. And the alteration of charters granted with such reservations is as justifiable, both constitutionally and morally, as the termination of special favors. See *Pratt Institute v. City of New York*, 183 N. Y. 151; *Commonwealth v. Fayette County Railroad Co.*, 55 Pa. St. 452. The language used in previous New York decisions under the General Tax Law, as well as in very similar cases in other states, seems to exclude the attempted distinction. See *Matter of Huntington, People ex rel. Cooper Union v. Gass*, *supra*; *Wagner Free Institute v. Philadelphia*, 132 Pa. St. 612. So, in view of the fact that the General Tax Law was intended to cover and reduce to uniformity the whole subject of exemptions from taxation, the court would have been justified in reaching an opposite conclusion. See *Pratt Institute v. City of New York*, *supra*; *Tracey v. Tuffly*, 134 U. S. 206.

TORTS — DEFENSES — DISCHARGE OF ONE JOINT TORT-FEASOR WITH RESERVATION OF RIGHTS AGAINST OTHERS. — For a consideration the plaintiff agreed to discharge one of several joint tort-feasors, with an express reservation of the right to go against the others, among whom was the defendant. *Held*, that the agreement should be construed, not as a release, but only as an agreement not to sue the promisee, and therefore it is no bar to an action against the defendant. *Edins v. Fletcher*, 98 Pac. 784 (Kan.).

A joint tort is an integral wrong as to which there can be but one satisfaction. *Seither v. Phila. Traction Co.*, 125 Pa. St. 397. Hence a discharge of one joint tort-feasor, if intended to be in satisfaction of the claim, operates as a release of all, and an attempted preservation of the rights against the others is void for repugnancy. *Gunther v. Lee*, 45 Md. 60. But on the other hand it is held that the acceptance of a payment from one wrongdoer as partial satisfaction and a release to that extent discharge the other wrongdoers merely *pro tanto*. *Pogel v. Meilke*, 60 Wis. 248; *Merchants Bank v. Curtiss*, 37 Barb. (N. Y.) 317. Again a covenant not to sue one does not release his joint tort-feasors. *Emerson v. Baylies*, 19 Pick. (Mass.) 55. The intent of the parties in an instrument like that in the principal case can be carried out only by construing it as an agreement not to sue, given in consideration of partial satisfaction for the tort. See 16 HARV. L. REV. 529. Such a construction is justifiable: the nature of an instrument depends on its intended effect as gathered from the entire document. *Berridge v. Glassey*, 112 Pa. St. 442. Here the intent of the plaintiff to release one tort-feasor is no stronger than his intent to preserve his rights against the others.

TRADE UNIONS — BOYCOTTS — JUSTIFICATION FOR USE OF "UNFAIR" LIST. — The plaintiff owned a lumber yard. Because it persisted in employing a workman objectionable to the Building Trades Union, that organization declared a strike against it, placed it on the "unfair" list, and notified the building contractors who bought supplies from it that a union rule forbade any member to work upon materials purchased from dealers on the "unfair" list. As a result, the contractors ceased to deal with the plaintiff and even broke existing contracts. *Held*, that the plaintiff is not entitled to an injunction. *Parkinson Co. v. Building Trades Council*, 98 Pac. 1027 (Cal.).

That a threatened secondary boycott is ever justifiable is denied even by those who would allow competition to justify a primary boycott. *Pickett v. Walsh*, 192 Mass. 572, 586, 587. See 20 HARV. L. REV. 434, 438. The main case reasons that since a rule forbade union men to work upon materials purchased from an "unfair" dealer, the union in notifying the plaintiff's customers that the plaintiff had been declared "unfair," was fulfilling a moral duty to protect the customers against the strike which would inevitably result if they continued to purchase from the plaintiff. But to argue so, it is submitted, is to beg the question. It is difficult to see what peculiar virtue attaches to a union rule by reason of its enactment prior to the controversy, or how an illegal

act becomes any the less illegal because done under cover of such a rule. And the fact that the communication to the plaintiff's customers simply notified them of this rule did not in the least veil the underlying threat, as the facts of the case plainly show.

WILLS — CONSTRUCTION — WHETHER ANNUITIES PAYABLE FROM CORPUS. — A testator by his will gave to his sister for life an annuity of \$120 "payable out of" his estate, and in a subsequent clause gave the use of "the residue" of his estate to his wife for life "subject to the payment of the said annuity." After the wife's death the "said residue" of the estate was to go to the sister in fee. The value of the testator's estate was \$16,200. The wife filed a petition asking for a decree construing the will. *Held*, that she may pay the annuity out of the corpus of the estate. *Matter of Van Valkenburgh*, 60 N. Y. Misc. 497 (Surr. Ct.).

It is a general rule that an annuity charged upon an estate in general terms must be paid from the income if the income be sufficient. *Cummings v. Cummings*, 146 Mass. 501. The corpus may be touched only if the testator's intention to that effect clearly appears. *Taylor v. Taylor*, L. R. 17 Eq. 324. Particularly is this so when the situation is that of life tenant and remainderman. *Baker v. Baker*, 6 H. L. Cas. 616. And a disposition of the surplus of the income is an indication of an intention that the corpus should be untouched. *Stelfox v. Sugden*, Johns. 234. But if the income is insufficient the corpus may generally be charged unless there appears a clear testamentary intention to the contrary. *Croly v. Weld*, 3 De G. M. & G. 993. But in the principal case it does not appear that the income was insufficient for the payment of the annuity. And there is nothing in the will to indicate an intention that the widow might charge the corpus for its payment. See *Earp's Will*, 1 Pars. Eq. Cas. 453.

WILLS — PROBATE — COLLATERAL ATTACK ON JURISDICTION OF PROBATE COURT. — The plaintiff sued in trespass as executor. The defendant objected that the plaintiff, being a corporation, was not legally competent to act as executor. *Held*, that the probate court must be presumed to have decided upon the plaintiff's fitness, and that its judgment cannot be collaterally attacked in this action. *Union Savings Bank & Trust Co. v. Western Union Telegraph Co.*, 89 N. E. 478 (Ohio). See NOTES, p. 442.

BOOK REVIEWS.

A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS. By Walter Chadwick Noyes. Second Edition. Revised and Enlarged. Boston: Little, Brown and Company. 1909. pp. lx, 852. 8vo.

Since its publication this treatise has become recognized as an authority on the limited number of subjects covered, and widely used. The general merit of the work was amply set forth in a review of the first edition. See 16 HARV. L. REV. 314. The object of this review is to note the additions and revisions in this second edition. The division of the subject into five main heads is not changed. In the first three parts—Consolidation of Corporation, Corporate Sales, and Corporate Leases—the text is practically unchanged. Many late cases involving principles similar to those discussed in the first edition, or additional cases applying the same principles, or cases extending theories already considered, are cited. Several entirely new sections have been written as follows: Authorization of Consolidation of Interstate Railroads not Regulation of Interstate Commerce, Consolidated Corporation Liable upon its Own Obliga-

tions, Effect of Execution of *Ultra Vires* Contract for Exchanges of Property for Stock, Remedies of Dissenting Stockholders in Cases of Exchange of Property for Stock, *Ultra Vires* Sales of Property of Private and Quasi-public Corporations, *Ultra Vires* Sales of Franchises, and Assignment of Leases. The treatment of these topics is uniformly clear and the statement of the conflicting views on the complicated subject of *ultra vires* sales is excellent. The chief addition under the general heading of Corporate Stockholding and Control is a section dealing with collateral trust bonds. Their use as a means of borrowing has developed with the growth of corporate stockholding. The new cases that have arisen are cited and commented upon.

Since the first edition the growth of the law upon combinations, dealt with under the fifth head, has been marked. Even under the principles of the common law there have been many new cases. These have been digested under proper heads. The development has been by far the most important, however, in the law dealing with legislation against combinations. Realizing the importance of this, the author has almost wholly rewritten the last six chapters which deal with this subject. Legislation supplementing the federal anti-trust statute with the construction put upon it by the courts is fully considered. Questions arising in recent cases of just who are engaged in interstate commerce, of the application of the statute to labor organizations, to combinations under patents, under secret processes and concerning market quotations, are taken up in detail. The case of the *Northern Securities Co. v. United States*, 193 U. S. 197, commonly called the merger case, is exhaustively treated. If the author's conclusion is correct that from this case, the case of the *Shawnee Compress Co. v. Anderson*, 28 Sup. Ct. Rep. 572 and others, the law is that every contract in restraint of interstate commerce is illegal under the act, some amendment such as the one suggested by the author that the defendant may avoid its operation by showing affirmatively that the objects and methods are not injurious to the public, is imperatively necessary, if the act is to remain a law. Otherwise we have the alarming possibility of two individuals engaged in interstate commerce, for example, two expressmen who have formed a partnership to do business across state lines, under the ban of the criminal law and liable to imprisonment. See 17 HARV. L. REV. 474. In the last chapters upon state legislation, the author discusses, among other recent cases, the Supreme Court cases upholding the exercise of the police power to prohibit intrastate combinations and collects all the state statutes with the numerous cases applying them. As a means of finding the law as it is today upon these subjects, this new edition will surely meet with favor.

R. T. H.

THE LAW AND CUSTOM OF THE CONSTITUTION. By Sir William R. Anson. In three volumes. Vol. II. The Crown, Part II. Third Edition. Oxford: At the Clarendon Press. 1908. pp. xxiv, 347. 8vo.

Sir William Anson has done wisely in following the unusual practice of publishing new editions of his work piecemeal, instead of delaying until he could revise the whole of it at once, for by this means we are able to get a part of it brought up to date without having to wait until a man so busy as he is has time to complete the rest. The book now published is a revision of the second half of his previous volume, entitled "The Crown," and it covers local and colonial government, foreign relations, revenues and expenditures, the army and navy, the church, and the courts of law.

General comment on a work so well known as Sir William Anson's is unnecessary. Every student of English public life realizes that this is the most convenient and comprehensive book of reference, or textbook, on the laws and framework of the government. In a note to the new edition (49, Note 2), the author criticizes Dr. Redlich's book on English Local Government on the

ground that throughout the treatise there runs a thread of political commentary, not necessary nor always just, and not appropriate to a great work of historical and analytical exposition. Sir William Anson himself has not fallen into this temptation. He has kept himself in this edition, as always before, entirely aloof from politics, even if we use that word in the broadest sense.

In reviewing this edition, therefore, it is necessary only to mention the points in which it differs from the earlier ones. Throughout it has been carefully revised and brought up to date, only a small proportion of the pages remaining absolutely untouched. Yet over most of the book the changes are not numerous, and they relate in great part to acts passed, or decisions rendered, since the previous edition. Such new matters as the reorganization of the war office, the imperial defense committee, the army council, the reorganization of the territorial forces, and the right of criminal appeal, naturally appear; but the largest changes are to be found in the portions of the work devoted to local government and to the colonies, which have been very largely recast, and rearranged from somewhat new points of view. To our mind they have been improved by the change.

An introduction has also been added relating to the evolution and structure of some of the administrative departments and to the influence of the civil service. This would perhaps have been quite as germane to the first part of the work, a new edition of which appeared a year ago; but the first two parts are treated as one volume, and the note is valuable wherever it is placed.

One always feels in dealing with Sir William Anson's book a complete confidence in his accuracy in every detail, and no library — nor indeed any person who wants to keep in touch with that very changing organism, the government of England — can afford to be without the last edition of "The Law and Custom of the Constitution."

A. L. L.

THE LAW OF FRAUDULENT AND VOLUNTARY CONVEYANCES. By H. W. May. Third edition by W. Douglas Edwards. London: Stevens and Haynes. 1908. pp. lxiv, 516.

Unlike most textbooks, this treatise has not grown in size nor in the number of cases cited while going through its three editions; yet the third edition now offered to the profession under the editorship of Mr. Edwards is in the best sense a new edition, and brings the English law, within its field, to date.

May on Fraudulent Conveyances was first published in 1871. It contained 494 pages of text, the pages being somewhat smaller in size than those of the present edition. The second edition, which was not issued until 1887, was under the editorship of Mr. S. W. Worthington, who preserved the original plan. The work was divided into six parts: Part I. The General Operation of the Statutes of Elizabeth against Fraudulent Conveyances, and the General Distinctions between them; Part II. The Rights of Creditors under the Statute 13 Eliz. c. 5; Part III. The Rights of Purchasers under the Statute 27 Eliz. c. 4; Part IV. What is a Valuable Consideration under the Statutes of Elizabeth; Part V. Voluntary Dispositions of Property independently of the Statutes of Elizabeth; How validly made and in what instances they are liable to be set aside; Part VI. Miscellaneous Points, Practice under the Statutes of Elizabeth and Costs. An appendix contained Statutes 13 Eliz. c. 5; 27 Eliz. c. 4; 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43, and Cases from the Coxe and Melmoth MSS.

In the present edition the general plan and also the chapter division are still adhered to. By reason of the passage of 56 & 57 Vict. c. 21, the title of Part III is changed by the addition of "the Alteration of the Law hereon by the Voluntary Conveyances Act, 1893"; and the text is changed to conform to the alteration of the law. Parts V and VI are transposed in position. The Statutes 41 & 42 Vict. c. 31 and 45 & 46 Vict. c. 43 and the cases from the Coxe and Melmoth MSS. are omitted from the appendix, and the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21) is added. There are 444 pages of text,

a smaller number of pages than in the second edition. The number of cases cited is approximately the same. This, of course, is due to the fact that much of the earlier case law has become obsolete by virtue of the recent statute, giving an opportunity for excision, and also for substitution of new and important decisions on the Statutes of Elizabeth, and decisions on the Voluntary Conveyances Act, 1893. Though some United States cases are cited, the book is primarily an English book. Notwithstanding this, it is one that will be of value to practitioners here, for the underlying principles are of general application and they are clearly expounded, and are reënforced by the citation of authority.

It would be of advantage to the profession if authors of law textbooks, and more particularly editors of other men's works, would take example from Mr. Edwards, and realize that a new edition should mean a revision by a book in view of the latest laws and decisions; not merely an expansion by the mechanical addition of new citations to a previously written text, or an addition to such text of portions of the headnotes of cases decided between the editions.

S. H. E. F.

RATE REGULATION AS AFFECTED BY THE DISTRIBUTION OF GOVERNMENTAL POWERS IN THE CONSTITUTION. By Robert P. Reeder. Philadelphia: F. & J. W. Johnson Company. 1908. pp. 44. 8vo.

This monograph is essentially an inquiry as to the amount of discretion which may be granted to commissions in the fixing of railroad rates, without infringing the principle of constitutional law which prohibits legislatures from delegating powers confided exclusively to them.

A definite thesis is supported by the author, namely, that where in fixing specific rates the commission is merely following "principles" previously laid down by the legislature the rates so fixed are valid, the extent of the commission's power "depending on the completeness with which principles have been stated for its guidance." In reaching this general conclusion the author has made an excellent exposition of the nature of the rate-regulating power. But the more unsettled and important question now is the precise nature and extent of the "principles" which the legislature must lay down. How definite must the legislative rules for the guidance of commissions be, in order to give validity to their acts thereunder? This narrow question is the vital one, and in treating it the author is less satisfactory than in his preliminary discussion. There is a puzzling difficulty involved. If the legislature is compelled to lay down for the commission rules so detailed as to leave to the commission little or no discretion, the inconvenience of devising such rules will probably make the fixing of specific rates, as a practical matter, impossible. An important reason for the creation of commissions was this very inconvenience. If, on the other hand, the commission may fix valid specific rates under a broad legislative authorization, such as to fix "reasonable" rates, it would seem that the legislature has delegated all its power, for if "reasonable" rates mean rates not unconstitutionally high or low, the legislature itself could do no more than it has authorized the commission to do.

It could be wished that the author had discussed this narrower question more in detail and as applied to various specific statutes; for a solution must be found, — if possible, without abandoning either the convenience of commission rate fixing, or the rule forbidding the delegation of legislative powers.

As it is, a definite conclusion is reached only as to the Interstate Commerce Act which the author holds unconstitutional in so far as it authorizes the commission to fix "reasonable" maximum rates.

This little book is hardly one for the casual reader, either layman or lawyer, for its condensed style and lack of detailed headings make requisite the closest attention and the examination of decisions in connection with the text. So read, it will be found interesting and valuable.

The cases cited are well selected, and include the latest decisions. Unfortunately, however, two very important recent decisions of the United States Supreme Court and the New York Court of Appeals, which might have influenced the author's views, were not reported in time for citation and comment. See *Prentiss v. Atlantic Coast Line R. R.* (211 U. S. 210) and *People ex rel. Metropolitan R. R. Receivers v. Public Service Commission* (N. Y. L. J., March 4, 1909.) In the last two pages there are some insinuations of executive usurpation by President Roosevelt which seem out of place in an essay otherwise scientific and impartial.

G. C.

THE CONTROL OF PUBLIC UTILITIES. By William M. Ivins and Herbert Delavan Mason. New York: Baker, Voorhis and Company. 1908. pp. lxxix, 1149. 8vo.

The annotation of a statute within a year of its passage is a task that would deter one of less courage than Mr. Ivins. It is true that many of the decisions under the Interstate Commerce Act are more or less apt. The rather ample size of this book has, however, been attained by a considerable amount of skillful padding. A general index in large type of 206 pages, an index, of 73 pages, to the Interstate Commerce Law, which itself, together with the Elkins Act, fills only 30 pages, and an index of 64 pages to the Rapid Transit Act, itself occupying only 68 pages, account for a considerable portion of this amplitude. In 669 pages the authors have endeavored to annotate the Public Service Commissions Law of New York with decisions rendered in construing the federal commerce acts, and with a large bulk of miscellaneous matter, some of which is pertinent, and much of which might well be dispensed with. The book is consequently a kind of digest centered around the Public Service Commissions Law.

F. W. B.

THE MYSTERY OF THE PINCKNEY DRAUGHT. By Charles C. Nott. New York: The Century Company. 1908. pp. 334. 8vo.

Charles Pinckney of South Carolina presented a draught of a constitution to the Constitutional Convention in 1787. This draught was referred to the Committee of the Whole and later to the Committee on Detail. No copy of this draught was found with the papers and records of the Convention. In 1818 John Quincy Adams, then Secretary of State, requested Pinckney to supply a copy. In response to this request Pinckney furnished a copy which he stated to be the one of several rough draughts in his possession which he believed he had presented to the Convention. After Pinckney's death Madison, in commenting on this copy, cast doubts on its authenticity and stated that he believed it to be impossible that it was a correct copy. His position was based largely on the fact that the copy differed in several respects from the policies advocated by Pinckney before the Convention. Madison's attitude has hitherto been accepted with little dissent. The present author considers Madison's objections in detail and examines minutely the positions taken by Pinckney in debate and in print. Every statement of Madison is met, and the author reaches the conclusion that the copy furnished by Pinckney was in all essential particulars a true copy of the draught presented to the Convention. Furthermore he states that in all probability the draught was used by the Committee on Detail as the groundwork from which they built up their report, and its disappearance he accounts for on the assumption that it was used as printer's copy by the Committee. His conclusions are well supported by the facts which a careful search has disclosed, and his deductions seem well founded. To those who are interested in the historical evolution of the Constitution of the United States the book will warrant careful consideration, and later commentators on the Constitution must ponder long before they adopt a view unfavorable to the Pinckney draught as evidenced by the copy preserved among the archives of the State Department.

J. S. S.

- A TREATISE ON GUARANTY INSURANCE AND COMPENSATED SURETYSHIP.
By Thomas Gold Frost. Second Edition, Enlarged and Revised.
Boston: Little, Brown and Company. 1909. pp. liv, 802. 8vo.
- THE CRIMINAL RESPONSIBILITY OF LUNATICS. By Heinrich Oppenheimer.
London: Sweet and Maxwell, Limited. 1909. pp. vi, 275.
- A TREATISE ON THE LAW OF INSOLVENT AND FAILING CORPORATIONS.
By S. Walter Jones. Kansas City, Mo.: Vernon Law Book Company.
1908. pp. xxv, 1011.
- THE LAW OF CHILDREN AND YOUNG PERSONS. By L. A. Atherley Jones
and Hugh H. L. Dellot. With an introduction by Herbert Gladstone.
London: Butterworth and Company. 1909. pp. xxv, 380.

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THE RESPONSIBILITY AT COMMON LAW FOR THE KEEPING OF ANIMALS.

BAKER *v.* SNELL, [1908] 2 K. B. 352, 825.

A RECENT decision of the English Court of Appeal opens up matter of interest as to the responsibility of those who keep dogs and, incidentally, of those who keep other animals classed as *ferae naturae*. The case, which is reported under the name *Baker v. Snell*,¹ turns on the following facts:

A young woman, a housemaid of the defendant, a publican, had been bitten by a dog owned by her master "and known by that master to be ferocious and given to bite." The dog had previously bitten the plaintiff, and special precautions were adopted in keeping him. He was entrusted to the potman, who was not alleged to be incompetent, whose duty it was to let the dog out early in the morning, to exercise him and to have him chained up before the plaintiff and the barmaids came downstairs.

On the day of the occurrence for which the defendant was put to answer, the potman brought the dog into the kitchen where the plaintiff and the barmaids were at breakfast and said, "I will bet the dog will not bite anyone in the room." He then let the dog go, saying as he did so, "Go it, Bob." The dog thereupon flew at the plaintiff and bit her. The plaintiff brought her action. The view of the County Court judge before whom in the first instance the case came was² "that although the defendant's act in keeping the dog with knowledge of its savage nature was a wrong-

¹ [1908] 2 K. B. 352, 825.

² [1908] 2 K. B. at 354.

ful act in the sense that he kept it at his peril, still under the circumstances it was the potman and not the dog that did the damage, and that the keeping of the dog was only the *causa sine quâ non*."

The plaintiff appealed to the Divisional Court (Channell and Sutton, JJ.), which ordered a new trial. Channell, J., could not accept the ruling of the County Court judge: "If the potman had been a stranger I should be prepared to uphold the County Court judge's decision."¹ "In my view the potman's act amounted to nothing more than a foolish and wanton act done in neglect of his duty to keep the dog safe; and if that is the right view the defendant would be responsible." This is a hard saying, which, before we part with the case, we shall have to test. Channell, J., further delivered himself of the extraordinary suggestion that it would be open to a jury to find "that the dog bit the plaintiff by reason of its savage nature, and by reason of that alone, and that the act of the potman had nothing to do with the result." It is to be hoped that there is left in the English courts sufficient strength to set aside any such verdict as perverse, even if an English jury could be so foolish as to return such a verdict, in view of the wrongful letting go of the dog and the direct incitement when it was let go. A dog is not, in law, a responsible agent, — a potman is; and Channell, J., for the moment at any rate, seems to have lost sight of the principles that regulate the liability of responsible agents, *i. e.* human agents, when acting in conjunction with irresponsible agents, *i. e.* either natural or brute forces. Sutton, J., whose remarks found favour with the Court of Appeal, confined himself to quoting from *May v. Burdett*² that the owner "is bound to keep secure" any animal with a vicious propensity of which he has knowledge, "at his peril." This he explained to mean "that he is liable for any injury caused by the animal biting a person under whatever circumstances the biting may have taken place, except where the plaintiff by his own conduct has brought the injury upon himself."

The defendant then carried the case to the Court of Appeal, which was constituted by two eminent Chancery judges (Cozens-Hardy, M. R., and Farwell, L. J.) who enunciated some very startling theories, and a common law judge (Kennedy, L. J.) who, though taking a different view of some of the salient legal prin-

¹ [1908] 2 K. B. at 355.

² 9 Q. B. 101, at 112, 72 R. R. 189 (1846).

ciples involved and one which it is the object of this paper to support, yet concurred in the judgment of the Court and in some of the steps by which it was reached.¹ Cozens-Hardy, M. R., entirely adopted the view of Channell, J.,² that the potman's act was "a wanton and foolish act": "an act for which the defendant would be responsible"; and thus by begging one of the most important questions of the case, the liability of the master to one servant for the act of another servant, left himself free to roam through speculations as to the common law liability for keeping animals. He then formulates the following question:³ "If a man keeps an animal whose nature is ferocious, or an animal of a class not generally ferocious but which is known by the owner to be dangerous, is the owner of that animal liable only if he neglects his duty of keeping it safe or is negligent in the discharge of that duty, or is he bound to keep it secure at his peril?" He answers his question thus: "In my opinion the latter is the correct proposition of law, and I think that it is not open to the Court to decide the other way."

This conclusion he bases on an elaborate examination of five cases,⁴ none of which, my submission is, warrants it. He further says, "If it be true, as I think it is, that it is a wrongful act for a person to keep an animal which he knows to be dangerous, that is an authority not merely of the Court of Exchequer, but also of the Court of Appeal, that the person so keeping it is liable for the consequences of his wrongful act even though the immediate cause of damage is the act of a third party." The English of the judge or his reporter is a bit obscure; but it seems to point to a holding that anybody keeping an animal that harms another person not his owner, is absolutely liable and is not to be heard to make a defence. This, so far as the innocent owner is to be held liable for the act of an independent third person, is a principle altogether exceptional in law, save in "insurance" cases or cases of warranty, — that is, where a contractual duty exists, and fails in this case utterly if the principle of warranty is not made out.

To make out this, then, Farwell, L. J., adventures the opinion

¹ [1908] 2 K. B. 828.

² *Ante*, p. 466.

³ *L. c.* 828.

⁴ *May v. Burdett*, 9 Q. B. 101; *Jackson v. Smithson*, 15 M. & W. 563; *Nichols v. Marsland*, L. R. 10 Ex. 255, 2 Ex. D. 1; *Fletcher v. Rylands*, L. R. 1 Ex. 265, and L. R. 3 H. L. 330; and *Filburn v. People's Palace and Aquarium*, 25 Q. B. D. 258.

⁵ [1908] 2 K. B. 833.

that the cases "establish that the law recognizes two classes of animals—animals *ferae naturae* and animals *mansuetae naturae*. Any animal of the latter class when known to its owner to be dangerous falls within the former class, and anyone who keeps an animal of that nature does a wrongful act and is liable for the consequences under whatever circumstances arising." It is, continues the Lord Justice, "absolutely immaterial if the keeper of a dangerous animal keeps it at his own peril in all circumstances whether the injury arises from the actual negligence of the owner or from the act of a third person. The wrong is in keeping the fierce beast."

From this it seems to follow that the members of the Zoölogical Society of London, who keep scores of savage and dangerous wild beasts in their gardens, are continuously occupied in wrongdoing; and were, say, the Germans to take London and open the cages of the wild beasts, would be liable for all the damage that the liberated animals might effect in the course of their wanderings.

The decision of the majority of the Court of Appeal accordingly is, then, that a person keeping an animal *ferae naturae*, or an animal *mansuetae naturae* which is known to be savage (and under this nomenclature is included a Maltese puppy that has snapped at the lady's maid putting him to bed), is answerable in damages for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person, say the housemaid lovingly, but sharply, tweaking his ear.

As against this, four propositions are submitted:

(1) That the authorities cited by the majority of the Court of Appeal do not bear out the conclusion suggested.

(2) That the liability of the owner of a savage beast is *prima facie* only, and may be rebutted by showing that the owner is wholly without fault: that trespass is actionable only where there is fault.

(3) That, even if this is not so, the case of a dog differs from the case of lions, tigers and savage wild beasts, and that at common law there is an absolute right to keep a savage dog subject to liability *prima facie* to answer for his misdoings so far as savagery goes.

(4) That the fact that through the fault of one fellow servant another is bitten does not affect an innocent master with any liability.

(1) The principle asserted by Cozens-Hardy, M. R., and Farwell, L. J., is that it is a wrongful act for a person to keep an animal which he knows to be dangerous, that is, one that he knows has attempted to bite someone.¹

We are now to consider the authorities which the learned judges vouch as establishing this principle.

"In 1846," says Cozens-Hardy, M. R.,² "in *May v. Burdett*, the law was laid down by the Court of Queen's Bench in the case of a monkey.³ The action was brought by a man and his wife to recover damages for a bite, to the female plaintiff, and the declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large, and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff."

The point argued in the case on motion to arrest judgment⁴ was that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. All, then, that it was necessary to decide was whether in an action of this sort the *onus* lay on the plaintiff to prove negligence or whether it was necessary to the cause of action to prove negligence at all. The question whether the defendant might prove facts that exculpated him was immaterial and was not so much as hinted at.

All that, according to the head note of the report,⁵ the case did decide is that "A person who keeps an animal accustomed to attack and bite mankind with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities."

Cozens-Hardy, M. R., incorporates in his judgment the passage from Lord Denman, C. J.'s, judgment with which the head note textually corresponds. He then refers "to a passage in Hale's Pleas of the Crown,"⁶ and cites a long passage from Lord Denman's judgment as if it was deduced from the passage in Hale,

¹ *Worth v. Gilling*, L. R. 2 C. P. 1.

² 9 Q. B. 101, 111, 112.

³ 72 R. R. 189, 9 Q. B. 101.

⁴ [1908] 2 K. B. 828.

⁵ 9 Q. B. 110.

⁶ Vol. i, p. 430 b, ed. 1800.

concluding,¹ "we are besides of opinion, as already stated, that the defendant, if he would keep it [the monkey], was bound to keep it secure at all events."

It is obvious that the words "secure at all events" are ambiguous and may be satisfied by regarding the liability as *primâ facie* absolute, but yet as not excluding the defendant from averring circumstances in discharge of liability. Reference to Lord Denman, C. J.'s, judgment shows that the latter is the sense in which he was using the words. He says,² immediately before the passage cited by Cozens-Hardy, M. R., "It may be that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it and shows a *primâ facie* liability in the defendant." Thus no opinion was given in *May v. Burdett* upon the point raised in *Baker v. Snell*: whether, and in what circumstances, the owner of a dog that is known to be ferocious is shut out from averring his absence of liability where he is "utterly without fault" in the circumstances leading up to and causing the injury. But since Cozens-Hardy, M. R., cites the passage from Hale, and since Lord Denman, C. J., bases his conclusions upon it, it would be well to see what Hale says. Here it is:

"If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing hurt and the beast kills a man, by the ancient Jewish law the owner was to die for it, *Exod. xxi*, 29, and with this seems to agree the book of 3 Edw. 3. Coron. 311; Stamf. [*sic*] P. C. 17a, wherein these things seem to be agreeable to law."

"(1) If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it."

"(2) Tho he have no particular notice that he did any such thing before, yet if it be a beast that is *ferae naturae* as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose."

"(3) And therefore in case of such a wild beast or in case of a bull or cow that doth damage, where the owner knows of it, he must

¹ [1908] 2 K. B. 829.

² 72 R. R. 198, 9 Q. B. 113.

at his peril keep him up safe from doing hurt, for tho he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages."

It will be noted that this is a strong authority for the proposition for which Lord Denman, C. J., cited it. It will also be noted that it is an authority against the proposition in support of which Cozens-Hardy, M. R., and Farwell, L. J., use it; for Sir Matthew Hale excepts a dog from the third proposition which he confines to "such a wild beast" as "a lion, a bear, a wolf, yea an ape or monkey" or "a bull or cow."

Such a great common lawyer as Hale would be expected to discriminate a dog from a lion or a monkey; for the considerations to be presently noted could not be absent from his mind.

But to trace the matter home. The authority for Hale's statement is Fitzherbert, Corone, pl. 311, which is thus reproduced by Staundforde: ¹ "*Si home ad un jument² que est accustome a male faire, et le owner ceo bien sachant, ne liga luy, eins luy suffra daller a large, et puis le jument tua un home; que ceo est felony in le owner, eo que per tiel sufferance, le owner semble daucer volunte a tuer. Et nota que in ancient temps la volonte fuyst cy material, que il fuist reputé pur le fait ut patet titulo Corone in Fitz. P. 15. E. 3. P. 383³ . . . Et oue ceo accorda Bracton qui dit, in maleficiis spectatur voluntas et non exitus et nihil interest virum quis occidat, an causam mortis prebeat. Mes le ley nest issint a cest jour.*"

There is then nothing here that goes to show an absolute liability for a dog — rather the other way: and the case certainly does not lend any support to the proposition it is cited to establish.

"The next case in point of time," says Cozens-Hardy, M. R.,⁴ "was Jackson v. Smithson,⁵ which raised the point in a very neat form."

There is some ambiguity as to what the learned Master of the Rolls intends by "raised the point." If it is the point in Jackson v. Smithson then that is: whether the *plaintiff has to show* negligence in the keeping by the defendant of a ram, known to be accustomed to attack mankind, by which the plaintiff sustained

¹ Les Plees del Coron, p. 17. The edition quoted from is that of 1583. Rex v. Huggins, 2 Ld. Raym. 1583.

² *Jumenta a jungendo appellari Nonius putat, quod currui jungeretur, ut equi et muli et coetera dorsuaria animalia, quae Graeci *νωτοφόρα* vocant. Lexicon Juridicum, sub voce.*

³ The reference, in reality, is to Fitz. Abr., tit. Corone, P. 15. E. 2. P. 383.

⁴ [1908] 2 K. B. 829.

⁵ 15 L. J. Ex. 311, 15 M. & W. 563, 71 R. R. 763.

injury. If the point in *Baker v. Snell* is intended that is: whether the *defendant*, the owner of a dog known to be savage, is *precluded from showing* facts the conclusion from which is that he is blameless for injuries inflicted by his dog on the plaintiff. The former point may be neatly raised or not, but it is the exact point decided in *May v. Burdett*; and the remarks before made apply equally to it; the latter, which is the only relevant point here, is not even glanced at.

Cozens-Hardy, M. R., read the judgments delivered *in extenso*. They are emphatic that the case of *Jackson v. Smithson* is concluded by *May v. Burdett*; that is, that the *onus* suggested was not on the plaintiff. The judges of those days in the Exchequer were far too wary logicians to deduce from their negative conclusion an affirmative proposition that as the plaintiff was not put to prove negligence the defendant was debarred from showing as an effective defence that he was utterly without fault. Yet this is the leap into vacancy made by the learned Master of the Rolls and Farwell, L. J., a leap which must necessarily be taken in order to give even a semblance of relevancy to their proposition.

Two *obiter dicta* in *Jackson v. Smithson* must be noticed: one of Alderson, B.: "In truth there is no distinction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one that is *ferae naturae*."¹ Yet this may well be without restricting the owner of either from the right to defend himself on lines hereafter to be developed, and of course restricting the analogy to what hereafter will be shown to be the *fundamentum relationis*, that is, that each is regarded as property simply. The other *obiter dictum* is that of Platt, B.: "No doubt a man has a right to keep an animal which is *ferae naturae*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." *May v. Burdett*, which concludes this case of *Jackson v. Smithson*, shows beyond cavil, as has already been demonstrated, that responsible *prima facie* is what is intended. The dictum is, however, flatly in contradiction of Farwell, L. J.'s, assertion² that anyone keeping an animal known to be dangerous — the lion, for example, at the Zoölogical Gardens — "does a wrongful act."

¹ Between a dog, for instance, and a fox.

² [1908] 2 K. B. 833.

It is curious that Cozens-Hardy, M. R., and Farwell, L. J., should have regarded the next case they cite, *Nichols v. Marsland*,¹ as authority for their proposition; for the judgment of the Court of Appeal there is based on the rule of law laid down in *Rylands v. Fletcher*:² "We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, *must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape.* He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

It may be objected, indeed it has been by Farwell, L. J., that the exceptions noticed here are an exhaustive enumeration of the possible exceptions and not mere illustrations of what may be exceptions. But a glance no further than the opposite page of this report³ refutes this, for Mellish, L. J., commenting on the passage just noticed, adds another exception to those enumerated, namely, the act of "the Queen's enemies." Yet why is *primâ facie* to be read if *primâ facie* is not intended but "absolutely without qualifications"? There is, however, one passage quoted by Cozens-Hardy, M. R., which reads strongly against the absolute principle which he formulates. It is this:⁴ "The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any fault of his own, by the act of God or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity."

Now in the present case the duty incumbent on the keeper of a wild animal or a savage dog, whatever it may be, is clearly a duty created by the law; and it needs considerable subtlety of mind to understand how a case, which incidentally affirms the proposition that where a party is disabled from performing a duty without any fault of his own the law will excuse him, can be usefully cited in support of the proposition that where a party is disabled from

¹ L. R. 10 Ex. 255, in Ct. of App., 1 Ex. D. 1.

² L. R. 3 H. L. 339.

³ Quoted from 2 Ex. D. 5.

⁴ [1908] 2 K. B. 831, citing Mellish, L. J., in *Nichols v. Marsland*, 2 Ex. D. 4.

performing a duty without any fault of his own the law will *not* excuse him.

In any view the only question decided in *Nichols v. Marsland* — the question of law which was left undecided in *Rylands v. Fletcher* — was, "Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*":¹ not what are the circumstances in which a defendant may excuse himself, but the much narrower issue whether *vis major* is one of them.

*Filburn v. People's Palace and Aquarium Co.*² is the last case cited by Cozens-Hardy, M. R. He considers it³ "a strong authority" for the proposition that a person keeping an animal that he knows to be dangerous is liable "for the consequences of his wrongful act even though the immediate cause of damage is the act of a third party."

The head note in *Filburn's* case is as follows:

"In an action to recover damages for personal injuries sustained by the plaintiff from an elephant which was exhibited by the defendants, the jury found that the defendants did not know the elephant to be dangerous: — Held, that the defendants were liable, as the animal did not belong to a class which according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character."

It may be noted that the defendant nowhere sought to excuse himself by alleging act of God, or of the King's enemies, or any such defence. The only point was whether the English courts would regard an elephant as *mansuetæ naturæ*; and they declined to do so. It is a far cry from this to the affirmation of a principle that, where the owner of a beast *feræ naturæ* is without any fault of his own disabled from performing the duty of safe custody that the state has imposed upon him with regard to it, the law will not excuse him.

Yet these are the authorities from which Cozens-Hardy, M. R., draws his conclusion that it is "settled law"³ that a person keeping an animal *mansuetæ naturæ* which is known by him to be savage is answerable in damages for any harm done by the animal even though the immediate cause of the injury is the intervening voluntary act of a third person. This conclusion, it may be noted,

¹ 2 Ex. D. 4.

² 25 Q. B. D. 258.

³ [1908] 2 K. B. 832.

is reached through an assumption that involves the proposition that a pampered but irritable Maltese terrier is esteemed by the common law to be indistinguishable from a man-eating tiger: a draught from that reservoir of the principles of the common law which, Lord Coke tells us, resides in the breasts of His Majesty's judges.

Yet before dismissing this portion of our subject it will be well to note the case of *Card v. Case*,¹ not referred to by Cozens-Hardy, M. R., nor reprinted in the Revised Reports. The reason for this omission probably is that the decision is upon a mere pleading point, the effect of a plea of Not Guilty.

The defendant was the owner of a dog which had chased and killed sheep belonging to the plaintiff, but the defendant had no knowledge of any propensity in his dog to worry sheep. The question was whether proof of knowledge could be required of the plaintiff under the pleadings for the plaintiff to make out a case. It was held that it could and the plaintiff was non-suited.

In giving judgment, however, Maule, J., says:² "Now the cases of *May v. Burdett* and *Jackson v. Smithson* and the general course of precedents and authorities referred to in the former case, prove that the wrongful act is the keeping of a ferocious dog knowing its savage disposition; and that an action of this kind may be maintained without alleging any negligence": all which may be conceded without affecting this argument, since it is common ground that there are circumstances, *e. g.*, the plaintiff's own act, the act of the King's enemies, *vis major* (and it is suggested other circumstances), which will discharge the strong *prima facie* liability that is on the defendant.

Another and later expression by a judge of the same Court should be noticed as it is in a line with Cozens-Hardy, M. R., and Farwell, L. J.'s opinion. Williams, J., in *Cox v. Burbidge*³ says: "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." This it may be noted leaves

¹ 5 C. B. 622 (1848). Cf. *Thomas v. Morgan*, 2 Cr. M. & R. 496.

² 5 C. B. 633. See reporter's note at 624.

³ 13 C. B. N. s. 438. Cf. *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; also for remarks of Brett, L. J., see 44 L. J. C. P. 26.

open the point now contended for, that the right of action is *prima facie* only: *e. g.*, would not arise if the trespass were due to the King's enemies driving it there; or other circumstances utterly without my fault, such as my own enemy driving it there.

One point made in *Card v. Case* may here be noticed: the gist of the action for injury from a savage dog is not the keeping of the dog but the keeping him with knowledge of his savage disposition; but as Pratt, B., points out,¹ even in the case of an animal *ferae naturae* (which will presently be shown to be only identical with a dog to a limited extent) nobody—not even the Attorney General—has a right to interfere with another in doing so “until some mischief happens.” Then (as in the analogous case of an adjacent landowner making excavations which bring down the surface of his neighbour's land) there is an action based on the damage done which arises only on the occurrence of the injury. The keeping of an animal *ferae naturae* is, therefore, by the common law, with all apologies to Farwell, L. J., not a wrongful act; but it may become so on injury happening to a third person.

We have, however, already seen that it is not every injury that is sufficient to bring about this consequence; but, if that is so, the view contended for here *may* be right, that the owner is not liable for injuries that he is utterly unable to prevent; *e. g.*, such injuries as arise directly through the act of an independent wrongdoer, as in this case, and of which the owner is utterly blameless; for it is conceded that the principle does not cover injuries that “the plaintiff by his own conduct has brought” upon himself;² and one exception being established there may be others also; indeed so much is admitted. We must see what they are.

We are told, for instance, in the judgment in that case which places this liability at the highest point,³ and in a passage already set out, that “the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his own peril”; and this is the principle that is vouched for the present contention of the majority of the Court of Appeal. The limitation on this is, however, quite ignored; which Bramwell, B., thus states:⁴ “What has the defendant done wrong? What right of the plaintiff has

¹ *Jackson v. Smithson*, 15 M. & W. 565.

² [1908] 2 K. B. 833.

³ *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279; L. R. 3 H. L. 330, 339, 340.

⁴ *Nichols v. Marsland*, L. R. 10 Ex. 255, 259.

she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house and the water did mischief to a neighbour the occupier of the house would be liable. That cannot be."¹

But there is an absolute analogy to the case of keeping a wild animal — that of fire introduced on a man's land: surely as dangerous and as liable to become uncontrollable as dog or monkey or tiger.

In *Beaulieu v. Finglam*² the declaration alleged that every person by the custom of this realm shall keep his fire safely and securely, and is bound so to keep it lest any danger happen to his neighbour in any manner. Yet though the obligation is alleged as absolute, Markham, J., says: "If a man outside my household against my will sets fire to the thatch of my house or does otherwise *per quod* my house is burned and also the houses of my neighbours, I shall not be held to answer for them because this cannot be said to be ill on my part, but against my will."

This case is cited by Comyns³ and by Viner⁴ for the proposition that by the common law a man in whose house a fire originated, though by no act or fault of his, and even if it were accidental, was liable for whatever damage it caused to the house or goods of another.

But the same writers are agreed that if a *stranger* against my will puts fire in my house, by which the house of my neighbour is burnt, no action lies against me; and this was approved by Holt, C. J., and the judges of the King's Bench.⁵ In Comyns's Reports⁶ the judgment of the Court assigns the reason of the decision "for the duty to take care of" fire "is founded upon this maxim, *Sic utere tuo ut non laedas alienum*;"⁷ but if the fire of the defendant by

¹ Later on in the judgment the learned judge draws a distinction between water and a "wild or savage animal," and towards the end of the judgment he uses the often quoted illustration of lightning breaking the chain of the tiger.

² Y. B. 2 Hen. IV, 18, p. 16.

³ Action on the case for negligence, A. 6.

⁴ Actions — B for fire.

⁵ *Turberville v. Stampe*, Ld. Raym. 264.

⁶ Vol. i, 33.

⁷ Note that this is the ground of decision in *Rylands v. Fletcher*, L. R. 2 H. L. 330, and see particularly per Lord Cranworth, 341.

inevitable accident, by impetuous and sudden winds, and without the negligence of the defendant or his servants (for whom he ought to be answerable)¹ did set fire to the clothes of the plaintiff in his ground adjoining; the defendant shall have the advantage of this in evidence, and ought to be found not guilty."

Here then in the case of fire is an exact analogy to the case of the keeping of an animal *ferae naturae* where by the common law an absolute obligation was yet held to admit of proof that the defendant was utterly without fault and was therefore free from liability. Considerations of space do not admit of further elaboration of this part of the argument.

My submission is that what has been said justifies the proposition with which we set out, that the authorities examined do not justify their conclusion but do warrant a conclusion contradictory to that of the Court of Appeal.

(2) The liability of the owner of a savage beast and, *a fortiori* of a dog, is *prima facie* only and may be rebutted by showing that the owner is wholly without fault: trespass is actionable only where there is fault.

There are several misapprehensions that must be removed before we can enter on the question whether the liability for the bite of a savage dog is by the law of England absolute, in the sense of Farwell, L. J.,² "under whatever circumstances arising," or whether it may be excused when the act complained of is utterly without the fault of the defendant, as by the act of an independent wrong doer.

The most noteworthy of these misapprehensions is that of Farwell, L. J.:³ "The cases in my opinion establish that the law recognizes two classes of animals — animals *ferae naturae* and animals *mansuetae naturae*. Any animal of the latter class when known to its owner to be dangerous falls within the former class, and any one who keeps an animal of that nature does a wrongful act," etc. Now passing for the moment the bad law in this statement, note the frailty of its logic. It assumes that all animals *ferae naturae* are governed by the same law; indeed the Lord Justice builds on this as a postulate. Accordingly it must be a shock to the Lord Justice to find that for the ferocities and trespasses of by far the greatest number of *ferae naturae* in England there is no liability at all. For

¹ But this only so far as "it shall be intended that the servant had authority from his master, it being for his benefit." *Ld. Raym.* 265.

² [1908] 2 K. B. 833.

³ *Ibid.*

rabbits are *ferae naturae*; yet where a man so encouraged rabbits on his land that they multiplied to such numbers that his neighbours' lands were destroyed by being overrun with them it was adjudged that the neighbours had no remedy; "for so soon as the coneys come on his neighbour's land he may kill them, for they are *ferae naturae*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property and which the other may lawfully kill."¹ This is not obsolete but living law which has within the last few years been considered by the courts.²

Again, a fox is *ferae naturae*; yet Twisden, J., is reported in *Mitchil v. Alestree*³ as saying, "If one hath kept a tame fox, which gets loose and grows wild, he that kept him shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature. *Vide* Hobart's Reports, 134. The case of *Weaver v. Ward*." And *a fortiori* this holds of all foxes kept on land but not tamed.

Yet again, to take another class of *ferae naturae*, — swans, — the rule of law is quite different with regard to them, as reference to the Case of Swans⁴ will abundantly demonstrate.

Yet another rule is found as to "*des bestes sauvages*" — this time deer which had escaped from a park — in the 12 Henry VII (1497); and are reported about in Keilwey's Reports, 30; and for whose trespasses it is there held that there is no liability.⁵

Already enough exceptions have been instanced to demonstrate the error of the assumption made by Farwell, L. J., that the law is the same with regard to all animals *ferae naturae*: that, given the class of *ferae naturae*, the property of imputing liability for their trespasses attaches to all animals that are members of the class.

¹ Boulston's Case, 5 Co. 104 b.

² *Ferrer v. Nelson*, 15 Q. B. D. 258 (1885), a case in which Kennedy, L. J., was counsel.

³ 1 Vent. 295 (1676); *Brady v. Warren*, [1900] 2 I. R. 632, 661.

⁴ 7 Co. 15 b. The following passage (p. 17 a) has always seemed to me too quaint not to be brought to light on every relevant occasion: "for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is to die so joyfully that he sings sweetly when he dies; upon which the poet saith:

*Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui,"* etc.

A very dubious compliment to the female!

⁵ See Y. B. 10 Hen. VII, 6, pl. 12, and *ibid.* 30, pl. 28.

The same illicit assumption is nevertheless also made by Kennedy, L. J.¹: "*There is no doubt* that the keeper of a ferocious dog if he knows it to be ferocious is in exactly the same category as the keeper of a naturally wild animal." What category is that? The same as a rabbit, a fox, a swan, or a deer escaped?

Here attention may be directed to the reversal in this case of the usual practice of the Court of Appeal; a practice inseparable from correct reasoning when the daily growing complexity of modern life is kept in sight. The value of the common law is that with an exact logic, much to be desired of latter days, it has worked out broad and discriminating general principles apt for the simple needs of a much less complex society than ours. The application of these principles is made by the courts today, not by generalizing these principles but by differentiating them: we have long had the general distribution of legal principles. The work of today is to specialize. If the generalization of the common law was such (which it was not) that it did not distinguish between the pet black and tan terrier shivering with nervousness and the caged tiger at the Zoölogical Gardens, then a sense of humor and of the ridiculous, if not the dictates of common sense, would seem to impel the Court of Appeal to do so, and to lay stress on the essential difference of the two cases, obvious to the most obtuse, rather than to perpetuate an absurdity and add new life to it. As a matter of fact the Court of Appeal has exerted itself to affirm an identity that the common law never asserted, instead of to define a principle that the common law at the worst had only too generally and ambiguously stated. But of this presently when we have contemplated for a moment Bramwell, B.'s, chained tiger.

Another misapprehension that must be noticed has seized upon Bramwell, B.'s, doubt.² "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable." The rule of law is clear *Actus Dei nemini facit injuriam*: a rule to which we have not yet found an exception. Why should the tiger make one, or have one made for him? Channell, J.,⁴ and Kennedy, L. J.,³ agree, and it is submitted are right in their opinion, that there is no such special rule. We will proceed to consider why.

¹ [1908] 2 K. B. 834.

³ [1908] 2 K. B. 354.

² *Nichols v. Marsland*, L. R. 10 Ex. at 260.

⁴ *Ibid.* 835.

A consideration of the cases of the rabbit, the fox and the deer compared with that of the tiger may enable us to get a glimpse of what was in Bramwell, B.'s, mind; for there is no doubt that the rule governing one class of these animals *ferae naturae* is different from that prevailing in the other.

If the fox has betaken himself to a hole in a wood adjacent to a poultry yard, there is no liability on his late owner for his maraudings. If a tiger has taken up his quarters in a cave near a cow shed which he resorts to as his larder, the expense of his keep will nevertheless fall on his abandoned owner. The reason for this difference of treatment is this: the fox has merely cast off disabilities, resumed his freedom and returned to his natural home; he has become once again identified with his kind. The tiger has not been able to do this. He is not indigenous; he is an importation. He is merchandise.¹ He is property with the marks of his identity as such indelibly stamped on him, by his rareness, if not by his individuality. If one bring a tiger upon property he is bound to safeguard against danger from him to just the same extent as one bringing a reservoir filled with water on to land, though the tiger is not so dangerous. Bramwell, B., in looking at this aspect of the tiger as a beast brought for whim as property to a place where by nature's ordering no tiger was, has a qualm whether the responsibility of bringing a tiger into a district to live is not so serious an undertaking as to require additional safeguards to those attaching to the common law: is not the possessor of property so extremely hazardous bound absolutely to safeguard it? Glancing at the point incidentally he expresses the doubt — that is all.

Tigers and lions² could not have been imported in such quantities in the times in which the common law was taking shape as to be the subject of a separate principle devised for dealing with them, on the ground that they were *ferae naturae*. They may be accretions to the class by reason of their strong characteristics; they

¹ "So a man may have a property in monkeys, parrots, etc., for they are merchandise and valuable": Comyns, Biens (F.) What things are *nullius in bonis*.

² The earliest record there is of lions in England is in William of Malmesbury's *De Gestis Regum Anglorum*, Bk. V, § 409 (p. 485 in the Rolls Series Edition). *Paulus Orcadam comes quamvis Noricorum regi hereditario jure subjectus, ita regis amicitias suscipiebat ut crebra ei munuscula missitaret: nam et ille prona voluptate exterarum terrarum miracula inhiabat, leones, leopardos, lynces, camelos, quorum foetus Anglia est inops, grandi, ut dixi, jocunditate a regibus alienis expostulans: habebatque conceptum quod Wudestoeche dicitur, in quo delicias talium rerum confovebat.* This was before A. D. 1135. There is a ridiculous story of the lions in the tower of London in the time of James I in Notes and Queries (4th ser.), vol. ii, p. 73. Tigers do not seem to be noticed at all.

did not go originally to create it. We see then that the being *ferae naturae* is not (as the Court of Appeal is unanimous in supposing) the ground of the liability for the acts of an escaped tiger or of a biting dog. If it were so the liability would extend to the devastations of rabbits, the thefts of foxes, the evil wrought by squirrels, jackdaws and the rest, which it plainly does not. For the rule of liability for the mischief done by animals *ferae naturae* is diverse; and the ground of the diversity is whether the mischievous agency is property or not. This does not seem to have occurred to any member of the Court of Appeal. They accept a loose statement and clothe it with a pretence of uniformity where in truth there is none.

The fact of being property is what was seized on by the common law as the test to determine that the owner of a lion or a tiger or a monkey is liable for the mischief it does; and thus to include dogs in the same class as property, the pet poodle with the infuriated lion, is logical; to class them together on account of kindred ferocity is wholly irrational.¹ This plainly appears from *Ireland v. Higgins*,² a case decided so long ago as the year of the Spanish Armada's visit — and where it is said: "Horses, cows and all cattel³ which are most profitable for the service of man were at first *ferae naturae*, and so were dogs also; but since by use nothing is so familiar and domestick to man than is a dog, and then he cannot be *ferae naturae*; and therefore a trespass will lye for a dog, if he declare his dog, for that word does imply it is his domestic dog; and he much relyed on a book, the roll whereof he had seen Trin. 15 H. 7 Rot. 35, where a man justified in a trespass of battery in defence of his dog"; and the Court were all of this opinion.

But if this is so and the liability we are inquiring into is that which attaches to an owner of property whose property has done damage, there remains to be considered: what is the common law liability in trespass; is it absolute for all cases, or is it excluded where the owner is shown to be utterly without fault?

¹ Y. B. 12 H. VIII, f. 3, pl. 3, which is quite a *locus classicus*. Comyns, Biens (F.). What things are *nullius in bonis*. *Ferae Naturae*.

² Owen, 93.

³ "Chattels" is a French word and signifies goods which by a word of art we call *cattalla*. Now goods or chattels are either personall or reall. Personall, as horse, and other beasts, household stuffe, bowes, weapons and such like; called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions." Co. Litt. 118 b.

This subject has been discussed with great ability by Mr. Justice Holmes in his "The Common Law,"¹ who adopts the second of the alternatives suggested. He cites amongst others two very high authorities for his conclusion: Shaw, C. J.,² who says, "We think as the result of all the authorities the rule is correctly stated . . . that the plaintiff must come prepared with evidence to show that the intention was unlawful or that the defendant was *in fault*; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable"; he also cites Nelson, C. J.:³ "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. All the cases concede that an injury arising from inevitable accident or, what in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against is but the misfortune of the sufferer, and lays no foundation for legal responsibility."

These authorities would be sufficient were the law of England in all respects the same; but we find that, after an examination of the judgment of Blackburn, J., in *Rylands v. Fletcher*, Earl, C., says:⁴ "This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property."

We are therefore driven to the English cases to see whether, in the case of animals, they warrant a rule of absolute liability irrespective of blame which Earl, C., seems to assume is the American rule applicable to live animals.

What then is the English rule of law applicable to live animals? Blackburn, J.,⁵ answers thus: "There does not appear any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour." This is the conclusion arrived at after an examination of the cases

¹ Eng. Ed., 77 *et seq.*

² *Brown v. Kendall*, 60 Mass. 292, at 295.

³ *Harvey v. Dunlop*, Hill & D. Supp. (Lalor) (N. Y.) 193.

⁴ *Losce v. Buchanan*, 51 N. Y. 476.

⁵ *Fletcher v. Rylands*, L. R. 1 Ex. 282.

we have already discussed and the note in Fitzherbert's *Nat. Brevium*, 128, attributed to Hale, which says: "If A and B have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively, Dyer, 372, Rastal Ent. 621, 20 Edw. IV. 10, although wild dogs, etc. drive the cattle of the one into the lands of the other."

Note that there is nothing said here of the presence of the animals on the neighbour's land differentiating this case from the ordinary law of trespass for which a defence might be put in. The fact that wild dogs had driven them there would not rebut the presumption against the owner; for his duty is to prevent his cattle straying on his neighbour's land; and since they are property he is liable as if the trespass were his own personally; and the fact that the cattle were exposed to wild dogs would be insufficient to show that the owner was "utterly without fault"; still the owner would be admitted to prove that the wild dogs were turned amongst his cattle by an enemy who brought them to his land.¹

In England there is no distinction between inanimate and animate property brought by a man on to his land, and the rule is that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable."²

This juxtaposition of the phrases "at his peril" and "*primâ facie* answerable" in so authoritative a statement of the law of England—for the words are Blackburn, J.'s, in his famous judgment in *Fletcher v. Rylands*—concedes all that is contended for here, that the liability of the owner of a savage dog is *primâ facie* only; it is not a matter for which he is shut out from defence. It therefore does dispense with any necessity to run through that long list of cases from those in the Y. B. 21 Ed. IV. f. 64, pl. 37, and in Y. B. 22 Ed. IV. f. 8, pl. 24, down to that last cited, to make clear that the liability in trespass is not absolute, and, in the case here considered, is *primâ facie* only.

(3) But assume that the argument presented has been wrong up to this point and that there is no right to keep a lion or a tiger, and that the owner is, as Farwell, L. J., says,³ guilty of "a wrongful act" in keeping one and "is liable for the consequences under

¹ Cf. *Mitten v. Faudrye*, Poph. 161 (1624).

² L. R. 1 Ex. 279, per Blackburn, J.

³ [1908] 2 K. B. 833.

whatever circumstances arising." The point now to be made is that by the common law there is nevertheless a right to keep a savage dog. The confusion that has been made by classing dogs with lions and tigers for all purposes has already been pointed out to be due to the law fixing on the feature common to them all of being property. The dog is not in the same class as the escaped fox or the otter at large; because these have resumed the indulgence of their natural liberty and are not property. The dog is legally in the same class as the lion and the tiger, not because his teeth are as wounding, or his claws as terrible, but because he is property as they are. If they cease to be property, as by returning to Africa or Bengal, they may assume the status of the free fox or otter.

One bit of indulgence the law concedes to the dog over the lion or tiger viewing them from the aspect of property; that, though property, his wrongdoing is not imputed to his owner till he has given manifestation of an evil disposition *contra naturam suam* and his owner has notice of his backsliding; for by the common law a dog's disposition is not evil but gentle, while the same common law condemns the tiger's as bad without proof given. So soon as the dog is proved of bad disposition to the knowledge of his owner the rule of property seizes upon him and he is subject to it; not, I again say, because he is *ferae naturae*, but because he belongs to some one who has not prevented him from becoming a source of annoyance to others: he comes under the rule as to the safeguarding of property. He is volatile in disposition; so in his favour the strict rule of the duty as to property is relaxed and his transgressions are usually comparatively harmless; so that they are as a rule indulgently overlooked by the common law. He errs *contra naturam suam* by biting or any serious misdoing, and when his transgression is brought to the knowledge of his master he is brought into the severity of the rule that covers lions and tigers, and accumulations of water, or any dangerous dealing with property. Yet even when he has acquired the worst reputation the common law does not think of identifying him, as Farwell, L. J., supposes, with lion or tiger; for he may wander about merely trespassing at his will, and the law looks as indulgently on him as it does on the old maid's tabby cat, who may perambulate the tiles unchecked.¹

¹ Brown v. Giles, 1 C. & P. 118, 38 R. R. 769.

But the three learned judges of the Court of Appeal do not think thus, and they are unanimous on this point. "There is no doubt," says Kennedy, L. J.,¹ "that the keeper of a ferocious dog if he knows it to be ferocious is in exactly the same category as the keeper of a naturally wild animal." "Anyone who keeps an animal of that nature [*i. e.*, keeps an animal *ferae naturae*] does a wrongful act and is liable for the consequences under whatever circumstances arising," says Farwell, L. J.;² while Cozens-Hardy, M. R.,³ vouches that "it is a wrongful act for a person to keep an animal which he knows to be dangerous."

Before we apply ourselves to this piece of wisdom it may not be unprofitable to reflect on the state of rural England when the Common Law was forming, and, indeed, at any time up to the passing of the Reform Act; of England during the period of the Scotch and Welsh frontier disturbances; of England, and specially Yorkshire, during and after the period of the pilgrimage of Grace or of the rebellion of the Northern Earls; or of England during the period of the French wars or the wars against Napoleon. Effective police system there was none; footpads beset the byroads; lonely country houses were exposed to peril alike from ruffians born, disbanded soldiers and escaped French prisoners. Yet on the authority of the three learned judges we are told that to keep a savage dog as a guard for person or property against these perils was a "wrongful act." This being so, and as we have record of a bill filed in Chancery by a highwayman against his comrades to secure the equal distribution of spoils reaped on Hounslow Heath it is wonderful that we have no record of any application to the Farwell, L. J., of some past day to restrain the owner of some lonely manor house, marked down for plunder, from impeding operations by keeping the savage dogs kept, as their best protection, generation after generation, by dwellers in the country. If these dogs were only kept on the condition that they were warranted not to bite, what protection could they afford? Take the case that we are considering, a case of today, the case of an East London publican whose best, if not only effectual, protection against back door pot stealing sneaks is the wholesome knowledge of the presence of a dog that has had its bite and is waiting for another; are we to accept the view of the Court of Appeal that the keeping of such a dog is a wrongful act, a misdemeanour? Common sense

¹ [1908] 2 K. B. 834.

² *Ibid.* 833.

³ *Ibid.* 832.

is emphatic against such an absurdity; so, fortunately and not less uncompromisingly, is common law.

There was no law more savagely executed by the Norman Kings than the Forest Law, and no privilege that they more relentlessly guarded than their hunting rights. Yet even they had to recognize the right which the three learned judges deny — the right of the subject to keep savage dogs — for to do so, say they, is a “wrongful act.” Thus Manwood,¹ who wrote on the Forest Law in the reign of Queen Elizabeth has: ² “(1) The laws of the forest do so much regard the necessary use of dogs for the safety of men’s goods and houses who live within the boundaries thereof, that certain dogs are suffered to be kept therein by any person whatsoever. . . . (2) Every farmer and freeholder dwelling in a forest may keep a mastiff about his house; but such mastiff must be lawfully expeditated³ according to the laws of the forest; viz., by the Assizes of the Forest made in the reign of Hen. II, Cap. 6, called the Assizes of Woodstock, Mastiffs must be expeditated in a forest where the wild beasts have any peace. . . .” Moreover, though it was a serious crime for a man to kill a stag, yet by Article 9 in 6 Edw. I, in *Assisa forestae*, *Si quis mastivus inventus fuerit super aliquam feram et mutilatus fuerit, ipse, cujus canis erit, quietus erit de illo facto*; because, as I suggest, the importance was so great of allowing the forest dweller to have a fierce house guard.

Further on Manwood states,⁴ “Budæus calleth a mastiff *molossus*; and, in the old British language, that and all other barking curs about houses in the night, were called *masethefes*; because they maze and fright thieves from their masters”; and Coke gives the same questionable derivation with the same indubitably true underlying meaning: that the purpose of keeping them was to terrify wrongdoers and keep them from their masters and their houses. Yet the three learned judges appear to hold that this was an unlawful purpose, and that the dogs could only be kept if they were known to be useless for the purpose for which they were kept.

But if it was a right of the subject to keep these savage dogs even

¹ 1598. The edition used by me is the 4th, dated 1717.

² P. 107.

³ The manner of expeditating dogs is mentioned in *charta de Foresta* (9 H. 3) art. 6: *Talis autem expeditatio fiat per assisam communiter usitatam viz. quod tres ortelli abscindantur sine pellota de pede anteriori*. Coke, 4th Inst. on Courts of the Forest, p. 308 of edition of 1797, explains *ortelli* from French *orteiles* — claws; and *pellota* from the French *peolte*. *Sine pellota*, without the ball of the foot.

⁴ 4 ed., 113.

in the king's forest provided only they were maimed — maimed not to protect the subject but to protect the wild beast whom they were disabled from pursuing — how much more undoubted was the right to keep unexpeditated dogs¹ on the Welsh marshes or the Scottish border, or on the trackless Yorkshire moors, or amongst the Westmoreland and Cumberland hills.

That any such doctrine as that now broached was quite unfamiliar to so experienced a common lawyer as Lord Kenyon, C. J., may be gathered from his ruling in the case of *Brock v. Copeland*:² "Every man had a right to keep a dog for the protection of his yard or house: that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such an animal, so as not to endanger or injure the public: that here the dog had been properly let loose." Therefore the keeping the dog could not have been unlawful.

The principle of this decision was affirmed four years later by the Court of King's Bench in *Bates v. Crosbie*³ which held that "where a fierce and vicious dog is kept chained for the defence of the premises, and anyone incautiously, *or not knowing of it*, should go so near it as to be injured by it, no action can be maintained by the person injured, though he was seeking the owner, with whom he had business." The judges sitting in the King's Bench were Lord Kenyon, C. J., and Ashhurst, Grose and Lawrence, JJ., whom posterity has credited with a more than usual acquaintance with the principles of the common law.

Brock v. Copeland was cited in *Bird v. Holbrook*,⁴ and approved by the Common Pleas as an authority for the proposition "that a man had a right to keep a dog for the preservation of his house"; and a dog here must obviously mean a dog known to be savage; for, as to other dogs, there never could have been a doubt as to his right to keep them for any purpose whatever. There is no hint of any suspicion of the existence of the three learned judges' principle — that he was so entitled only if he knew that it was useless for the purposes of protection, or at any rate only if he did not know whether it was any good or not.

¹ Manwood, 118, §§ 47, 48.

² 1 Esp. 203, 5 R. R. 730 (1794).

³ M. T. 1798; 3 Christian's Blackstone, 154 n. (2).

⁴ 4 Bing. 628, 29 R. R. 657 (1828).

The case of *Beck v. Dyson*, a ruling of Lord Ellenborough, C. J.,¹ reported by the future Lord Chancellor Campbell, need not be much relied on though it points in the direction we are going. This new principle of the Court of Appeal was expressly negatived by Tindal, C. J., one of the very greatest common lawyers of the last century, who in *Sarch v. Blackburn*² says: "Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation in the way of access to his house that a person innocently coming for a lawful purpose may be injured by it."

It may be objected that this case is only at *nisi prius*; yet it was the ruling of a judge than whom none of his time was supposed to know common law more extensively or more accurately, and is cited by the chief text writers as correctly stating the law;³ and in conjunction with the other evidence we have been able to bring may be held to refute the statement that "the keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal."

In dealing with this point the case of *Smith v. Pelah*⁴ perhaps ought not to be passed over, as it is the only case that gives any semblance of authority for the principle accepted by the Court of Appeal. There Lee, C. J.,⁵ is credited with holding "that if a dog had once bit a man and the owner having notice thereof keeps the dog and lets him go about or be at his door, an action will lie against him at the suit of a person who is bit though it happened by such person treading on the dog's toes, for it was owing to his not hanging the dog on the first notice." But this humane and acute expression goes beyond even the anti-canine ardour of the Court of Appeal; who disclaim any liability to attach "where the plaintiff by his own conduct has brought the injury on himself";⁶ and the

¹ 4 Campb. 198, 16 R. R. 774 (1815).

² 4 C. & P. 297, 34 R. R. 805 (1830); *Curtis v. Mills*, 5 C. & P. 489.

³ *E. g.*, Clerk and Lindsell, *Torts*, 3 ed., 145; Addison, *Torts*, 8 ed., 713; Salmond, *Torts*, 355; Cooley, *Torts*, 2 ed., 407. Pollock, *Torts*, 8 ed., does not seem to deal with the point.

⁴ 2 Str. 1264, inconsistent with the King's Bench decision in *Bates v. Crosbie*, *ante*, p. 488.

⁵ Lord Campbell, *Lives of the Chief Justices*, vol. ii, p. 214, discussing this learned C. J. (1688-1754), says: "The honours of the profession may be considered a lottery; or if they are supposed to be played for — in the game there is more of luck than of skill." "The dull and despised William Lee did plod, did persevere and did become Chief Justice of England." And the passage extracted gives far from an unjust view of his merits.

⁶ [1908] 2 K. B. 833.

best way of treating this ebullition is probably that of Cresswell, J., in *Charlwood v. Greig*,¹ who mingles contempt with irony in his expression: "Our criminal law has been much modified since that time, and that would not now be considered as a proper mode of proceeding."

(4) The fact that through the fault of one fellow servant another is bitten does not affect an innocent master with liability.

One of the strangest features of this case is that throughout it the principle of the common law, that holds a master exonerated from liability for injury arising to one fellow servant from the negligence of another, might have been non-existent for any recognition it receives from any of the six judges (including the very learned County Court Judge) who have given judgment upon it. Yet the undisputed facts were these: A young woman in the service of the defendant had been bitten by a ferocious (if you please) dog owned by her master and entrusted to a potman, the defendant's servant, and her fellow servant, to keep securely. "Instead of performing his duty, he incited it [the dog] to fly at the plaintiff."² Now apparently this case is within the very words of the principle as expounded by Lord Cairns, C.,³ declared by the House of Lords to be the law of England in *Wilson v. Merry and Cunningham*: "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted, or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work."

And this is not a common law principle want of acquaintance with which may be palliated on the ground that it is obscured by age or rusted through desuetude; for in *Burr v. Theatre Royal, Drury Lane, Ltd.*,⁴ a case in which Cozens-Hardy, L. J., was a member of the Court, that great common lawyer, Collins, M. R., now Lord Collins, says: "It is a fundamental principle of law, except where the legislature has provided to the contrary" [*Baker v. Snell* is an action at common law], "that, wherever the relation of employer and employed exists, there is this limitation of the liability of the employer as regards injury occasioned by the negligence of a fellow servant." Collins, M. R., was alluding to the

¹ 3 C. & K. 46.

³ 1 Sc. App. 326, 332 (1868).

² Per Channell, J., [1908] 2 K. B. 355.

⁴ [1907] 1 K. B. at 555.

passage just cited from Lord Cairns, C.'s judgment. And while I am writing this the second division of the Court of Appeal has once more acted on this principle — which, as Collins, M. R., says, is a fundamental one.¹

The Divisional Court crowned its work in this case by ordering a new trial. This was apparently to leave to a jury the question "whether the man's [the potman's] wrongful act was done in the course of his employment or whether it was done for purposes of his own."² *Cui bono?* If the act was done in the course of his employment (of which by the way there is not a suggestion) the principle we have just introduced to the case for the first time is obviously applicable. If it was done "for purposes of his own," the liability of the master is equally negatived — unless on the supposition, which has been already examined, that keeping a dog that has snapped is *ipso facto* a wrongful act; but that is not Channell, J.'s view;³ and, even if it were, would need the introduction of yet another brand new Court of Appeal principle to vitiate the existing contract.

There is no dispute as to the facts, and no evidence that the man's act was in the course of his employment; so that even did a jury find that the act was so it would be the duty of the Court to enter judgment for the defendant.⁴

If Channell, J.'s method of getting rid of the case, by means of a bold and perverse finding by a jury, should be entertained as a means of avoiding the determination of problems too hard to be dealt with directly and judicially, the suggestion may be hinted that the jury should rather be enticed to venture even further and to find that the potman was incompetent; for in that event the difficulty of the common employment would be evaded, and by finding the servant incompetent only veracity would be tampered with, and not a fundamental principle of law. But we must part with this case, though unwillingly; for its interest is far from exhausted; and it is a very magazine of the principles of the common law, since *Contrariorum eadem est scientia*, and, however amazing the doctrine it broaches, it yet points to the light.

Thomas Beven.

LONDON.

¹ Coldrick v. Partridge, Jones & Co. Ltd., 25 Times L. R. 218.

² Per Channell, J., [1908] 2 K. B. 355.

³ *Ibid.* 354.

⁴ Allcock v. Hall, [1891] 1 Q. B. 444; Coyle v. G. N. Ry. Co., Ireland, 20 L. R. Ir. 409, 418.

SHOULD THE ANTI-TRUST ACT BE AMENDED?

THE Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," contains the following prohibitions:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of misdemeanor."

The cases arising under the Act may be classified under four heads, as follows:

First. Cases involving contracts, combinations, or conspiracies, by force, or by threats of damage to the property, business, or persons of others, to restrain trade or commerce of the public, or of others than those contracting, combining, or conspiring.

The Debs case¹ was of this class. Certain railway employes had entered into a combination or conspiracy to stop the operation of railways that were highways of interstate commerce. The stoppage or obstruction of the highways of interstate commerce necessarily operated as a direct restraint of the interstate commerce of the public generally.

Loewe v. Lawlor² also was a case of this class. Certain laborers had entered into a combination or conspiracy, by means of a trade boycott, to restrain interstate trade or commerce between certain manufacturers and their customers. While in this case there was no physical obstruction of commerce, the object of the combination was, by threatening damage to the business of other persons, to restrain them from engaging in interstate commerce until they had complied with the demands of the combination.

¹ *In re Debs*, 158 U. S. 564. See also *In re Phelan*, 63 Fed. 803; *United States v. Debs*, 64 Fed. 724.

² 208 U. S. 274.

Combinations and conspiracies, by means of physical force, or by means of a boycott or threats of damage, to prevent other persons or the public generally from engaging in interstate commerce never can be reasonable or just. All combinations and conspiracies of this class are illegal at common law, and it is eminently proper that, when in restraint of interstate trade or commerce, they should be prohibited by an Act of Congress as broad in its scope as the common law. Therefore, the absolute prohibition of the Anti-Trust Act should not be qualified or limited in its application to contracts, combinations and conspiracies of this class.

Second. Cases involving contracts or combinations among railway companies to increase or to prevent a reduction of the rates or charges to be paid by the public engaging in interstate trade or commerce upon the railways.

The railways are the principal highways of interstate trade and commerce, and it is the duty of each railway company to furnish transportation at reasonable rates over its railway. As was decided in the Debs case, any combination, by physical force, to restrain the transaction of commerce upon these public highways is in restraint of interstate commerce; and for similar reasons a combination among the owners of railways to render the transaction of interstate commerce upon the railways more difficult or more expensive is in restraint of the interstate commerce of the public.

The Trans-Missouri Freight Association case¹ and the Joint Traffic Association case² were of this class. In those cases it was held that contracts or combinations among railway companies to fix and maintain rates upon competitive interstate traffic operated as a restraint of interstate commerce, because the natural and direct effect of such contracts or combinations was to maintain rates at a higher level than otherwise would prevail. In these cases the combinations were held to be unlawful, not because they restrained interstate commerce of the railway companies, but because they operated as restraints upon the interstate commerce of the public. In this respect these cases were similar to those of the first class above referred to; but in the cases of the first class the restraint was an absolute one and was effected by force or duress, whereas in the cases now under consideration the restraint was only partial and resulted from the tendency of the

¹ United States *v.* Trans-Missouri Freight Association, 166 U. S. 290.

² United States *v.* Joint Traffic Association, 171 U. S. 505, 565, 569.

contracts or combinations to increase or to prevent a reduction of the charges or tolls to be paid by the public.

In the Northern Securities case,¹ it was held that a combination to acquire and to hold a majority of the stocks of two railway companies owning parallel and competing lines that were highways of interstate commerce was in violation of the prohibitions of the Anti-Trust Act. If, as decided in the prior cases, a contract or combination to maintain rates and to suppress competition among railway companies as to interstate commerce was in restraint of the interstate commerce of the public and therefore illegal under the Act, the Supreme Court clearly was right in holding that the combination in the case of the Northern Securities Company was illegal. The direct effect of the combination in that case was to destroy the possibility of true competition between two companies owning parallel and competing lines and to maintain their rates at a higher level than otherwise would prevail.

It has been contended that the unqualified prohibition of the Anti-Trust Act as applied to such combinations of railway companies should be limited, (*a*) because the enforcement of this unqualified prohibition would prevent railway companies from consulting among themselves as to their rate schedules in respect of competitive traffic, and from making joint arrangements that are necessary to the proper management of the railways throughout the country; and (*b*) because combinations among railway companies to maintain fixed rates that are not unreasonably high, or to divide or pool competitive traffic, and combinations to establish common ownership or control of competitive lines, should be permitted as such combinations would result in better and more economical railway service and would not injuriously restrain interstate commerce, since the railway companies are prohibited by law from imposing unreasonable rates, and any attempt to impose unreasonable rates can be prevented by application to the Interstate Commerce Commission.

It may be replied to these contentions, (*a*) that the Anti-Trust Act has not been construed and is not likely to be construed as prohibiting consultations among railway officials to establish uniform rate schedules for competitive business, provided that the railway companies do not undertake to maintain these rate schedules, or as prohibiting contracts or combinations of the railway

¹ Northern Securities Co. v. United States, 193 U. S. 197.

companies that do not impair their independence or their right to compete freely as to interstate traffic; and (*b*) that neither the common law and statutory prohibitions against unreasonable rates of railway companies, nor the powers of the Interstate Commerce Commission under the existing laws, furnish effective means of regulating railway rates. The only effective means of regulating railway rates have been and still are competition by rail and by water, the necessities of trade and commerce, and the enlightened self-interest of the railway companies themselves.

In the opinion of the writer, an exemption from the operation of the Anti-Trust Act would be of little advantage to the railway companies. Agreements among railway companies to maintain fixed schedules of rates and agreements to divide or to pool competitive interstate traffic probably were illegal before the Anti-Trust Act was passed, and they certainly proved ineffective. The desirability of such agreements in the interest of the railway companies has been greatly diminished by the enforcement of the laws requiring rate schedules to be filed and prohibiting any departure from these schedules. Contracts and combinations, by means of purchases and consolidations or by means of stock control, to unite competitive railway lines under a common ownership or control are prohibited by the laws of many of the states, and a mere exemption from the operation of the Anti-Trust Act would not render them lawful.

It is improbable that Congress would pass a law enabling the railway companies to enter into such contracts and combinations even if Congress had power by such a law to override the prohibitions of the state laws; and it is equally improbable that Congress would repeal the prohibition of the Anti-Trust Act as to such contracts and combinations without at the same time conferring upon the Interstate Commerce Commission the power of its own motion to prescribe, and from time to time to change, complete schedules of rates in respect of all interstate traffic affected by such contracts and combinations. The far-reaching results of such an extension of the power of the Interstate Commerce Commission cannot be overestimated, and its disadvantages to the railway companies probably would far outweigh any advantages that would accrue to them through such contracts and combinations.

Third. Cases involving monopolies, or attempts to monopolize, or combinations or conspiracies to monopolize, any part of the

trade or commerce among the several states or with foreign nations.

In *Addyston Pipe Co. v. United States*¹ it appeared that all or nearly all of the manufacturers of iron pipe within thirty-six states and territories had combined under an agreement to apportion among the members of the combination the trade in iron pipe within the prescribed territory. The purpose of the combination was, by establishing a community of interest among the manufacturers, to destroy competition among them and to monopolize the trade in iron pipe within the territory covered by the agreement.

*Montague v. Lowry*² was another case of this class. Certain dealers in tiles in California and certain manufacturers of tiles in eastern states had formed an association under an agreement prohibiting the dealers from purchasing tiles from manufacturers who were not members of the association and prohibiting the manufacturers from selling tiles to any dealers in California who were not members. The object of the association was, by establishing a commercial boycott against other dealers, to secure to those dealers who were members of the association a monopoly of the business in tiles.

The Anti-Trust Act prohibits not only the monopolizing of any part of trade or commerce, but also every attempt to monopolize and every combination or conspiracy to monopolize, though no monopoly in fact be created. The illegality of an attempt to monopolize, or of a combination or conspiracy to monopolize, does not depend upon the success of the attempt, or upon the results accomplished by the combination or conspiracy.

But there can be no attempt to monopolize and no combination or conspiracy to monopolize unless there be an intent or purpose to effect a monopoly,³ or unless the necessary result of the acts of the parties, if successful, would be to create a monopoly, in which case the intent or purpose to monopolize may be implied. It should be observed also that the Act does not prohibit the monopolizing of the manufacture or of the ownership of articles of trade or commerce, but it prohibits only the monopolizing of trade or commerce itself.⁴

¹ 175 U. S. 211.

² 193 U. S. 38. See also *Swift v. United States*, 196 U. S. 375; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227.

³ See *Swift v. United States*, 196 U. S. 375, 396.

⁴ In *United States v. E. C. Knight Co.*, 156 U. S. 1, 17, it was held that although a combination of sugar refining companies created a monopoly of the manufacture of

A monopoly involves complete control of a branch of trade, or such control as substantially precludes competition. A combination that diminishes competition in a branch of trade does not create a monopoly if substantial competition remains. The second section of the Anti-Trust Act does not prohibit acts or combinations that merely restrain competition, or that in conjunction with other further restrictions of competition might result in a monopoly, unless such acts be steps in carrying out an attempt or purpose to effect a monopoly of a branch of trade or commerce. An act that diminishes competition is not unlawful unless it creates a monopoly, or unless it is a step in carrying out an attempt to effect a monopoly. A combination that diminishes competition is not unlawful unless the purpose or effect of the combination is to create a monopoly.

It follows, therefore, that if two or more manufacturers or merchants who are competitors in some branch of interstate commerce should form a partnership or other combination destroying competition among them, this would not be in violation of the second section of the Act, unless the purpose or the effect of the combination was to monopolize a branch of interstate trade or commerce.

Individual manufacturers or producers of articles of interstate trade or commerce often enter into agreements to sell their products to certain dealers and no others. Exclusive trade agreements of this kind never have been held to be unlawful as creating monopolies. Such agreements plainly are distinguishable from the combinations or conspiracies condemned in *Montague v. Lowry* and in the case of the *Addyston Pipe Company*.

Attempts to monopolize and combinations and conspiracies to monopolize any branch of trade or commerce are unlawful at common law, and it is proper that all such attempts, combinations and conspiracies to monopolize interstate commerce should be prohibited by Act of Congress.

No doubt it would be desirable to define what constitutes a

refined sugar within the United States, it did not create a monopoly of trade or commerce in refined sugar or constitute a combination to monopolize trade or commerce. Chief Justice Fuller said: "It does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

monopoly or an attempt to monopolize a part of interstate trade or commerce; but it is very questionable whether a comprehensive and clear statutory definition could be framed. A statutory definition probably would give rise to as much uncertainty and litigation as the word "monopolize," and judicial decisions would be necessary to define the definition itself. The safer and better course is to let the courts, guided by common understanding of the word "monopolize" and by the principles of the common law, settle the meaning of the statute by determining its application to individual cases as they arise.

Fourth. Cases involving contracts or combinations that merely prevent or diminish competition among those contracting or combining, without restraining the trade or commerce of others and without constituting a monopoly, or an attempt to monopolize, prohibited by the second section of the Anti-Trust Act.

At common law such contracts and combinations were not unlawful, except that a contract of an individual not to exercise his craft or trade was held to be unreasonable and void unless the contract was for the purpose of carrying out some lawful transaction, such as a sale of the business or good-will of the contracting party.

The Anti-Trust Act does not purport to prohibit contracts or combinations that merely diminish competition, nor does it purport to prohibit contracts that merely restrict the liberty of an individual to exercise his craft or trade. The first section of the Act prohibits only contracts and combinations *in restraint of trade or commerce*, and the second section prohibits only contracts and combinations creating a monopoly or for the purpose of creating a monopoly.

The Anti-Trust Act was passed for the purpose of protecting the public against unlawful restraints of trade and commerce, and not to protect individuals from the consequences of their own acts or contracts. It is very doubtful whether Congress would have constitutional power to pass a law merely for the protection of the personal liberty of individuals by preventing them from entering into contracts or combinations limiting their power to engage in interstate commerce in competition with others. Such a law for the protection of the personal liberty of contracting parties could not fairly be considered a regulation of interstate commerce within the meaning of the Constitution.

The prohibition of the first section against restraints of trade or commerce cannot fairly be construed as prohibiting all contracts

that merely diminish competition among those contracting or combining. Such a construction would give to the phrase "in restraint of trade or commerce" a meaning never before attributed to it by lawyers or by the public generally and would render the second section of the Act purposeless. If *all* contracts and combinations diminishing competition were prohibited by the first section, contracts and combinations to monopolize were included in the prohibition, and there was no need of a second section to prohibit monopolies, attempts to monopolize, and combinations to monopolize.

Many contracts and combinations that simply restrict competition among those contracting or combining, without involving monopolies or attempts to monopolize, are necessary to the successful conduct of trade and commerce, and such contracts and combinations always have been considered reasonable and proper in the United States as well as in other countries. If the Anti-Trust Act should be construed as prohibiting contracts and combinations of that class, it would be impossible, without incurring civil and criminal liabilities, to carry on the trade and commerce of the United States.

For these reasons it is submitted that the first section of the Anti-Trust Act should not be construed as prohibiting contracts and combinations that simply prevent or diminish competition among those contracting or combining without restraining the trade or commerce of others, and that such contracts and combinations are unlawful only if they are in violation of the second section which prohibits monopolies, attempts to monopolize and combinations to monopolize any part of interstate trade or commerce.

While there are numerous dicta to the effect that all combinations in restraint of the freedom of competition are in violation of the Anti-Trust Act and unlawful, there appears to be no decision that the Act prohibits contracts and combinations that merely prevent or diminish competition among those contracting or combining, without restraining the freedom of trade or commerce of others and without constituting a monopoly, or an attempt to create a monopoly, of any branch of trade or commerce.¹

In the opinion of the writer, it is not desirable to amend the Anti-Trust Act until the Supreme Court shall have decided

¹ See *United States v. Joint Traffic Association*, 171 U. S. 505, 567.

whether the prohibitions of the Act apply to contracts and combinations of that class. If the Supreme Court should decide that such contracts and combinations are prohibited, an amendment of the Act certainly would be needed. But if the Supreme Court should decide that contracts and combinations of that class are not prohibited by the Act, but are governed by the state laws, no amendment of the prohibitions embodied in the first three sections of the Act would be needed.

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NEW YORK.

MOTIVE AS AN ELEMENT IN TORTS IN THE COMMON AND IN THE CIVIL LAW.

THERE is a growing body of authority in the French law in favour of the proposition that legal rights are not absolute. The maxims *Nullus videtur dolo facere qui jure suo utitur*,¹ and *feci sed jure feci* are no longer regarded with the same respect as formerly. It is now generally admitted that a person whose action is shown to have been merely malicious cannot shelter himself behind the plea that he was within his right. For no right extends to the permitting of one man to injure another unless there is some legitimate excuse for so doing.

As an owner of property, for example, I may carry on operations on my land which injuriously affect my neighbour provided they do not amount to a nuisance and are of utility to me. Or, as a trader, I may by my energy and skill cause injury to my rivals provided I employ no unlawful means.²

In these, and in other cases, there is a reason of public policy in favour of freedom even though damage is caused. But no public policy is in favour of encouraging malicious acts. And, here as elsewhere, there is a degree of negligence so great that the law assimilates it to malice.³ Proof of malice is, as a rule, difficult to make, and, in general, has to be inferred from the circumstances.

Many French authorities now suggest another criterion. It is urged that a right is created to serve a certain end or purpose, and that it cannot lawfully be exercised in an abnormal way, *i. e.*, in a way contrary to this economic or social purpose for which it exists.⁴ According to the expression which has now come into general use in the French law, the malicious or abnormal use of a right is a ground of damages and is spoken of as an abuse of the right.

The general rule that the *normal* exercise of a right cannot render the actor liable in damages was expressly affirmed in a

¹ Dig. 50. 17. 55.

² See Pand.-franç. vo. Liberté du Commerce, n. 386. Cf. *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25, 23 Q. B. D. 598.

³ Cass. 11 juin 1890, D. 91. I. 193.

⁴ See Saleilles, *Étude sur la Théorie Gén. de l'Obl.* 2 ed. p. 371; Charmont, in *Revue Trimestrielle*, 1902, p. 122.

recent French case. The keeper of a café put up a notice in his establishment, *le café ne sert pas de byrrh*. "Byrrh" is a kind of drink manufactured by a particular firm and patented. The owners of it sued the café-keeper for damages. The Court of Pau held there was no liability. There was no proof of malice, and it could not be inferred merely from the notice. The café-keeper had the right not to sell byrrh, and the right to inform his customers of that fact. The court held that these rights had been exercised in a normal manner.¹

On the other hand, the principles as to abuse of rights are thus laid down in a recent case: "Rights are limited not only in their extent, but also in their exercise, which is permitted only for certain purposes. There is, therefore, abuse of the right if it is exercised with the intention of injuring another, and, perhaps also, if it is exercised without an interest or without lawful motives. Thus it is a duty not to use one's rights in all their rigour when it is possible to protect one's interest without going to this extremity."²

There is now a considerable literature in France upon the subject of *Abus des droits*.³ The doctrine is not a new one, but it has been much more emphasized in recent years, and has been applied by the courts in very various circumstances. The principle was, however, formulated in admirable terms by Larombière: — "In order that the exercise of a right should guarantee entire and perfect freedom from liability, it is necessary that the person who exercises it should make a prudent use thereof, with ordinary precautions, without abusing it, and without exceeding its just limits. Any abuse which he should make of it which causes damage would render him liable to repair the damage so caused. *A fortiori* he would be liable if, among different ways of exercising his right, he had maliciously, and with the intention of causing injury, chosen that one which must or might cause the most damage. Malice is then more than a fault and it deserves no indulgence."⁴

That the principle is gaining ground is well seen by the fact that

¹ Pau, 18 juin 1897, Dall. 97. 2. 335. See Dalloz, Rép. vo. Responsabilité, nos. 101 seq. and Supp. eod. vo. nos. 60 seq.

² Trib. Civ. Toulouse, 13 avr. 1905, Dall. 1906. 2. 105.

³ See Jossierand, L., *De l'Abus des Droits* (Paris, 1905); Charmont, art. in Rev. Trim. 1902, p. 113; Saleilles, *Étude sur l'Obligation*, 2 ed. n. 310, and notes to D. 1908. 2. 73; Dall. 1906. 2. 105; Sir. 1904. 2. 217. For the best criticism see the note by M. Esmein to Sir. 1898. 1. 17.

⁴ Obligations, ed. of 1885, art. 1382, n. 11, v. 7, p. 544. Cf. Toullier, v. 11, n. 119.

the German Code expressly provides that "the exercise of a right is not permitted when its only object can be to cause injury to another,"¹ and that the draft of the Federal Civil Code of Switzerland declares, "He who evidently abuses his right enjoys no legal protection."² As regards the common law the fullest consideration of the question with which I am acquainted is the suggestive article by Mr. James Barr Ames in the HARVARD LAW REVIEW for April, 1905, on the subject, "How far an Act may be a Tort because of the Wrongful Motive of the Actor."

It is, however, in France that the theory has received the most countenance. Most French writers accept the doctrine that an act which is done not for the protection of any legitimate interest, however small, but simply out of the desire to injure another — *nuire à autrui sans profit pour soi-même* — is illegal and entails liability in damages.³

It was disputed by some of the older writers.⁴ And there are still eminent authorities who deny its soundness.⁵ To a considerable extent the disagreement is a question of terminology. It is admitted by almost all French authorities that the number of rights which are absolute is extremely small. Rights are limited in their extent. Instead of saying that such and such an exercise is an abuse of right, it is argued that we should say that the right does not extend to the case in question.

M. Planiol, who entirely condemns the term "abuse of rights," and, contrary to most authorities, will not admit that the legality or illegality of an act can depend on the motive with which it was done, nevertheless approves of most of the decisions of the courts in which the theory of abuse of rights has been applied. He does not dispute the soundness of most of the results reached; but is of the opinion that the judgment should have been rested on the non-existence of the right, or its non-existence to the extent claimed, rather than on a supposed abuse of it. He says, "The new doctrine rests entirely upon a phraseology insufficiently studied: its formula, 'abusive use of rights,' is a logomachy;

¹ B. G. B. art. 226.

² Art. 3, 2nd alin.

³ Sourdat, v. 1, n. 439; Proudhon, Usufuit, v. 3, n. 1686; Toullier, v. 2, n. 119; Laurent, v. 20, n. 410. And see note to Cass. 22 juin 1892, S. 93. I. 51; Pand. franç. vo. Responsabilité Civile, n. 534.

⁴ See e. g. Demolombe, v. 12, n. 648.

⁵ M. Esmein in note to Cass. 29 juin 1897, Sir. 98. I. 17; Planiol, Tr. Elém. 4th ed. v. 2, s. 870; Baudry-Lacantinerie et Barde, Oblig. 2 ed. v. 3, n. 2855.

for, if I use my right, my act is *lawful*; and when it is *unlawful* it is because I exceed my right and act without right, *injuria*, as the *Lex Aquilia* calls it. To deny the abusive use of rights is not to try to make pass as permissible the very various kinds of acts causing damage which have been repressed by the jurisprudence; it is only to make this observation, that every abusive act, by the mere fact of its being unlawful, is not the *exercise of a right*, and that the 'abuse of rights' does not constitute a juridical category distinct from unlawful acts. We must not be cheated by words: *the right ceases where the abuse commences*, and there cannot be an abusive use of any right whatever, for the irrefutable reason that one and the same act cannot be at the same time in *conformity with the law and contrary to the law*. . . .

"At the bottom everybody agrees; only in the cases where certain people say 'there is an abusive use of a right,' others say 'there is an act done without right.'

"The only truth at all new, if indeed it is so, which results from these discussions is that there are considerable and continual variations in the ideas which men form of the extent of their rights. Such and such a right which was formerly considered to be absolute has ceased to be so; such another which used to be subject to few restrictions has seen these restrictions multiplied."¹

This reasoning has been accepted in some French courts,² and it is certainly true that some classes of rights vary with changes in the ideas of the society in which they are exercised. This is the case, for example, with the husband's right of control over his wife. It is hardly open to dispute that at one time a husband was conceived to have the right to chastise his wife in order to enforce obedience. Beaumanoir, writing in 1283, said: *il loit bien à l'homme à batre sa fame sans mort et sans mehaing?*, i. e., he may beat her short of death and mutilation.³ And d'Argentré, commenting on l'Ancienne Coutume de Bretagne, art. 423, says: *Maritus retinere et castigare uxorem debet*. And even in the middle of the eighteenth century Dareau writes: *Quand elle s'écarte de ses devoirs, qu'elle les oublie, il est fait pour les lui retracer et en exiger la pratique . . . en un mot, il a la voie de la correction jusqu'à certaines bornes, et pourvu qu'il ne les franchisse pas, il ne fait que son*

¹ Tr. Elém. 4 ed. v. 2, n. 871. The italics are M. Planiol's.

² See, e. g., Toulouse, 20 juill. 1896, Dall. 97. 1. 542.

³ Coutumes de Beauvaisis (ed. Salmon), v. 2, n. 1631. Cf. Ancienne Coutume de Bergerac, art. 82.

devoir.¹ And he even says: *Un mari n'est comptable à personne de la manière dont il punit sa femme lorsqu'elle le mérite*.² But M. Fournel, his editor, writing in 1785, thinks this goes too far, and says it is only among the lower classes that physical chastisement is tolerated. There has been no legislation limiting the husband's authority, but it is universally admitted that the right of beating a wife no longer exists in France.³

The same process can be traced in England. An old writer stated the law then, "The husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner."⁴ But such expressions are now characterized by learned judges as " quaint and absurd dicta." ⁵ What once was a right has ceased to be so, because gentler and more civilized manners have become usual. The right itself has shrunk.

But M. Planiol's reasoning on the general question is, I venture to think, not sound. There is a clear distinction between an act which is an abuse of a right and an act which is done without right. As it has been very well put, "The notion of abuse of a right is connected with the idea of the end aimed at [*le but*]: not only is every right limited in its extent, but in addition, its exercise cannot be allowed for every possible end; there is an abuse if the right is exercised without an interest and without lawful excuse [*sans motifs légitimes*]."⁶

Thus the right of an owner extends to sinking shafts in his land. The land is his *usque ad centrum*. But if he sinks such shafts merely to injure his neighbour, this is to abuse the right of an owner. It is the intention to injure, or the want of a lawful motive, which converts an act otherwise lawful into one which is unlawful. Quite different is the case of the man who has no right. The man who sinks a shaft in his neighbour's land is without any right, and can be restrained whatever may have been the motive.⁷

This general principle of abuse of rights has been applied by the courts in every department of the law. Such questions as to the

¹ *Traité des Injures*, ch. iv, s. 1, n. 2, p. 224.

² *Ibid.* ch. iv, s. 1, n. 8, p. 242.

³ See note to Chambéry, 4 mai 1872, *Dall.* 73. 2. 129.

⁴ Bacon, *Abr.*, tit. Baron & Feme, B. See also Fitzherbert, *Nat. Brev.* 80; *Seymore's Case*, *Godbolt.* 215, 78 Eng. R. 131.

⁵ *The Queen v. Jackson*, [1891] 1 Q. B. 671, 679.

⁶ M. Tissier in *Revue critique*, 1904, p. 509.

⁷ See the criticism in Jossierand, *De l'abus des droits*, 74.

absolute character of rights are apt to arise under leases. In a lease it is a common stipulation that the tenant shall not sublet to any person unless he is approved of by the landlord. Does this give the landlord an absolute right of refusal without being bound to give any reason?

According to the old law it appears that the court might control the arbitrary refusal of the landlord.¹ But C. C. 1638 (C. N. 1717) says the stipulation against subletting must be strictly observed, and the prevailing view in France is that the landlord's right of refusal under such a clause is an absolute right.² In our courts there is some authority to the contrary. In one case it was held that the right of the lessor was not so absolute but that the court had power to weigh his motives, especially when he refused systematically to accept a sub-tenant unless he was paid for consenting.³

In the law of status the theory of abuse of right has been applied in several cases.

I have already discussed the case in regard to the husband's right of personal control over the wife. The principle has been applied also to cases relating to the husband's authorization of his wife's contracts and to cases as to a father's right to refuse consent to the marriage of his minor child. The husband has the right to demand the nullity of contracts made by the wife without his authorization.⁴ But an abusive exercise of the right will not be permitted.

In a French case a husband and wife, common as to property, had been living apart for a number of years. The wife had been carrying on a series of speculations on the stock-exchange. In these transactions she had passed herself off as an unmarried woman. The husband was aware of what she was doing. Subsequently he brought an action against the brokers with whom his wife had dealt, claiming repetition of sums paid by her for "differences" and pleading that her contracts with them were null as unauthorized. It was held that he could not turn round in this way and take advantage of a fraud which he had facilitated.⁵

¹ Pothier, *Louage*, n. 283.

² Baudry-Lacantinerie et Wahl, *Louage*, 2 ed. v. 1, n. 1104. But see R. T. 1908, p. 305.

³ *David v. Richter*, 1882, 12 R. L. 98 (Mathieu, J.); *Charbonneau v. Houle*, 1892, 1 S. C. 41 (C. R.). *Contra*, *Dorion, J.*, in *Hearn v. Dane*, 11 R. de J. 232. See Mignault, v. 7, p. 320.

⁴ C. C. 183; C. N. 225.

⁵ Cass. 8 nov. 1905, *Dall.* 1906. 1. 14.

In a case here, after a judgment of separation from bed and board a husband demanded the nullity of the sale by the wife of an immoveable on the ground that the sale had not been judicially authorized by him or by a judge.¹ Andrews, J., dismissed the action on the ground of want of interest.²

And a plaintiff who seeks to press a claim in which he has no interest is seeking to make an abusive use of his right.

By C. C. 119 (C. N. 148) children who have not yet attained the age of twenty-one years must obtain the consent of their father, or, if he be dead, of their mother, before contracting marriage. The view of most writers is that this is an absolute right enjoyed by the father which cannot be controlled by the court. It is a matter entrusted by the law to his discretion, and the court has no authority to overrule his decision, even though it is averred that his refusal to consent was prompted by pure caprice or by malice.³ And this view has been followed in one case in our courts where one of the *considérants* was that the paternal authority was a purely personal privilege which could not be exercised by the court in place of the father.⁴

Tradition is, notwithstanding, against the opinion that the father's right is so absolute that the court is not entitled to examine the reasons for his refusal to consent to the marriage. It is clear that in many cases his knowledge of the circumstances, and his interest in the happiness of his child, will give great value to his opinion. The court would be extremely slow to find that the father's discretion had been unfairly exercised. But cases are conceivable in which it might clearly appear that his refusal was against the interest of the child, and, it may be, prompted by actual malice. In such cases it is contrary to justice that the father's authority should be subject to no control, and that he should be able to say with impunity *stet pro ratione voluntas*. In the Roman Law, in spite of its exaltation of the *patria potestas*, the court could examine the motives of the father's refusal and could, if necessary, overrule it.⁵ And Pothier thinks a case might be made out for the interference

¹ C. C. 210.

² *Letourneau v. Blouin*, 1892, 2 S. C. 425.

³ *Baudry-Lacantinerie et Houques-Fourcade*, *Personnes*, 2 ed., v. 2, n. 1483; *Planiol*, *Tr. Elém.* 4 ed. v. 1, s. 769; *Aubry et Rau*, 4 ed. v. 5, s. 462, p. 71; *Huc*, v. 2, n. 32.

⁴ *Leveillé v. Leveillé*, 1895, 1 R. de J. 443 (De Lorimier, J.).

⁵ *Dig.* 23. 2. 19.

of the court, and, on the recommendation of relatives, for dispensing the minor from obtaining a father's consent.¹

This was the old law of the parts of Germany governed by the civil law.² In France and in the law of Quebec the language of the code is so explicit that it appears impossible to admit to the court the power of controlling the father's discretion by giving a consent in his place. But does it follow that if his refusal causes damages he should not be liable in reparation?

This has been considered in two French cases, and in both of them the principle has been admitted that the refusal of the father might, in certain circumstances, be an abuse of right. In the last case, and the only one in which damages were actually given, the father had first consented to the engagement of his minor son. Relying upon this consent, the woman to whom his son was engaged had given up her business, and had removed to the town in which the son resided. The father afterwards withdrew his consent. It was held that he was liable in damages to the woman.³

The doctrine of abuse of rights is also applied in France in regard to abusive use of legal proceedings in civil suits. And the law of Quebec upon this subject follows the French.

To bring an action in order to intimidate the other party and to force him to agree to a compromise which is unfair to him amounts to violence, and a contract extorted in such a manner can be annulled. This was held in one case where an action was brought against the captain of a ship on the day before his vessel was due to sail. He was placed in the alternative of paying what was demanded or of delaying the departure of his vessel. The court, being satisfied that the claim was an unjust one and made for the purpose of intimidation, rescinded the compromise to which the captain had agreed.⁴

And a party by his conduct of a case, *e. g.*, in causing vexatious delays, multiplying incidents of procedure, entering an appeal and not appearing, and the like, may shew that the action is vexatious and may be found liable in damages to the other party in addition to expenses.⁵

¹ Mariage, n. 332.

² See *Motive zu dem Entwurfe*, etc., v. 4, p. 28: But by the new code it is only an emancipated child who has a right of appeal against the father's refusal. B. G. B. art. 1308.

³ Lyon, 23 janv. 1907, Dall. 1908. 2. 73. See Alger, 9 avr. 1895, Dall. 95. 2. 320.

⁴ Cass. 19 févr. 1879, Dall. 79. 1. 445. Cf. for other cases of abuse of the right of action, Cass. 11 juin, 1890, Dall. 91. 1. 193.

⁵ Cass. 3 août 1891, Dall. 92. 1. 566; Cass. 26 avr. 1898, Dall. 98. 1. 391; Cass. 20

So also, in France, a newspaper which exceeds the limits of fair comment is said to abuse the right of freedom of the press.¹ And the same term is applied to a person who, being protected by some special privilege or immunity, makes an abusive use of this privilege to turn his speech or writings into a vehicle for the expression of private malice.² In the English law it would seem equally correct to say that a statement made maliciously on a privileged occasion was an abuse of the privilege.

The principle has also been applied in regard to the right to strike. In a number of cases in which the right of workmen to strike, or the right of trades unions to call out their men, has been elaborately discussed, it has been settled in France that the right is one which can be exercised only from motives of trade interest. Threats of a strike in order to injure a particular workman, or to put pressure upon him, are as a general rule illegal. They are certainly so if prompted by mere malice. But they might be justified by shewing that the dismissal of the workman was a matter which affected the safety or the collective interests of the strikers.³

And, according to recent French authority, even the refusal to contract may in certain circumstances be an abuse of right. In a recent case the Court of Cassation has accepted the principle that a man has not an absolute right to refuse to enter into a contract with another man.⁴ An employer, for example, has not an absolute right to say that in future he will not employ any union men. His refusal may be justified if he can shew that it was prompted by business considerations. But if it appears to have been prompted by ill-will against the members of a particular union the employer is liable in damages.⁵ This decision has recently been followed in a group of cases.⁶ These cases seem to go very far, and I think

juin, 1904, *Dall.* 1906. 1. 476. So in the law of Quebec also, though in our practice a separate action must be brought for the damages.

¹ *Josserand, De l'abus des droits*, p. 24. See *Cass.* 8 mai, 1876, *Dall.* 76. 1. 259; *Cass.* 29 juin, 1897, *Dall.* 97. 1. 537 (the phrase is not employed in the judgments).

² See upon "privilege" in the French law, *Grellet-Dumazeau, De la Diffamation*, v. 2, p. 189; *Pand.-franç. vo. Diffamation-Injure*, nos. 1181 seq. (des immunités).

³ *Nîmes*, 2 févr. 1898, *Dall.* 98. 2. 103 (group of workmen); *Chambéry*, 14 mars, 1893, *Dall.* 93. 2. 192; *Cass.* 9 juin 1896, *Dall.* 96. 1. 582. As to what are collective interests see the note in *Sir.* 1905. 2. 17. See on the subject generally the article by *M. A. Wahl* in *Rev. Trim.* 1908, p. 613.

⁴ *Cass.* 13 mars 1905, *Dall.* 1906. 1. 113.

⁵ *Trib. de Bordeaux*, 14 déc. 1903; *Sir.* 1905. 2. 17 note.

⁶ *Trib. Com. d'Eprenay*, 28 févr. 1906, etc. *Dall.* 1908. 2. 73.

that our courts would not interfere with the freedom of the individual to such an extent.

It is, however, in connection with the use of property that the doctrine of abuse of rights has been most fully considered, and I will attempt to trace the historical development of the French law upon this matter.

By the Roman law it was clearly laid down that an owner of land had the right to sink wells or make excavations in his land, and if, in so doing, he cut the veins which fed the springs of his neighbour this was not a ground of liability in damages.¹ But this was subject to the limitation that the act must not be merely malicious: — *Marcellus scribit cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sane non debet habere si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*² But the *onus* of proving malice was on the plaintiff, and, apparently, evidence that the operation was without any obvious utility was not enough to shift this *onus*.³

The texts in the Roman law are scanty, and the principle has in modern times been a good deal disputed. It appears, however, to be supported by the balance of authority in the modern civil law, though the difficulty of proving malice has made its application very rare.⁴

The modern German law has followed the same rule. The code declares, generally, "the exercise of a right is not permitted when its only object can be to cause damage to another."⁵ There is no doubt that in Germany the building erected purely to damage one's neighbour [*Neidbau*], or the well sunk for the same reason, is unlawful. The expression used in Germany for such malicious abuse of a right is *Chikane*.⁶

The principle that a merely malicious use of property is unlawful was accepted by many writers in the old French law;⁷ but is

¹ Dig. 39. 3. 21.

² Dig. 39. 3. 1. 12. Cf. Dig. 6. 1. 38; 39. 2. 26; 50. 10. 3; 8. 2. 9.

³ See Glück, Serie 39-40, Dritter Theil, p. 241; Windscheid, Pand. 7 ed. v. 1, s. 121, note 3 and s. 169, note 6.

⁴ Vangerow, Pandekten, 7 ed. v. 1, s. 297, anm. 2, p. 544; Windscheid *ut sup.* See Nathan, Common Law of S. Africa, v. 3, n. 1507.

⁵ B. G. B. art. 226. Cf. art. 826. See Windscheid, v. 1, s. 121, note 3.

⁶ See Cosack, Lehrbuch, 4 ed. v. 1. ss. 77, 209; Marcus v. Bose, O. L. G. zu Darmstadt, June 5, 1882, 37 Seuff. Arch. n. 292.

⁷ Guy-Coquille, Cout. de Nivernais, ch. 10, art. 1; Ferrière, Comm. de la Cout. de Paris sur l'art. 187; nos. 4 & 16 Fournel, Tr. du Voisinage, ed. 1834, v. 2, vo.

generally stated without any development and supported by the passage from Marcellus.

Domat says: — *Celui qui faisant un nouvel œuvre dans son héritage use de son droit, sans blesser ni loi, ni usage, ni titre, ni possession qui pourrait l'assujettir envers ses voisins, n'est pas tenu du dommage qui pourra leur en arriver; si ce n'est qu'il ne fit ce changement que pour nuire aux autres sans usage pour soi. Car en ce cas ce serait une malice que l'équité ne souffrirait point.*¹ And it is generally accepted by modern writers.² The jurisprudence is in the same sense.³ In the French law an owner of land may sink shafts, and make excavations in his land. But to take away his neighbour's lateral support is an abuse of the right of property. And when the soil is specially liable to slide he must take extraordinary means to prevent his neighbour's land from falling.⁴ And even when his operations are well within his boundary, so that his neighbour's lateral support is not affected, he must not act merely maliciously.

To cut the veins of a neighbour's spring for no purpose except that of doing him injury is unlawful. In one case two springs of mineral water were separated from each other by only a few yards but were in different properties. The owner of one of them put a hydraulic pump into his spring the effect of which was to draw away the greater part of the water from his neighbour's spring, and to allow this water to run away into the river. It was held that the rule *malitiis non est indulgendum* applied.⁵

In a more recent case of this kind a report by experts was ordered, and they reported that the operations were causing damage to the springs of a neighbour and could not be of any utility to the owner

Fumée, p. 131. See Augéard, Arrêts notables (Paris, 1756), v. 2, p. 252, n. 72; and other old cases cited by M. Appert in note to Sir. 1904. 2. 217.

¹ Liv. ii, Tit. viii, Sect. iii, n. 9, also Liv. iii, Tit. v, Sect. ii, n. 17. Sic. Basnage ed. 1709, sur l'art. 606, Cout. de Normandie, p. 490; Pothier, Société, n. 212; Dunod, Prescriptions, 3rd ed., 1774, part. ch. xii, p. 87.

² Daviel, Cours d'Eau, v. 3, n. 895; Toullier, v. 3, n. 328; Proudhon, Usufruit, v. 3, n. 1486; Aubry et Rau, 5th ed. v. 2, s. 194, note 19, p. 309; Laurent, v. 6, n. 140; Sourdat, v. 1, n. 439; Note by M. Appert under Trib. de Sedan, 17 déc. 1901, Sir. 1904. 2. 217; Baudry-Lacantinerie et Chauveau, Des Biens, n. 218, 222; Rev. Trim. 1905, p. 465, art. by Marquis de Vareilles-Sommières. *Contra*, Demolombe, v. 12, n. 648; Planiol, Tr. Elém. 4th ed. v. 2, s. 870.

³ Esmein in note to Cass. 29 juin 1897, Sir. 1898. 1. 17. Cass. 20 juin 1842, Dall. 43, 1, 68; Cass. 4 déc. 1849, Dall. 49, 1, 305 (note); Cons. d'Etat, 11 juill. 1879, Dall. 80. 5. 374.

⁴ Colmar, 25 juill. 1861, Dall. 61. 2. 212; Pand-franç. vo. Propriété, n. 136.

⁵ Lyon, 18 avr. 1856, Dall. 56. 2. 199. Contrast Montpellier, 16 juill. 1866, Sir. 1867. 2. 115, where there was damage but no malice.

of the land on which they were made. This was intimated to him, but the operations were not discontinued. It was held by the Cour de Lyon that this was sufficient proof of malice. And the Cour de Cassation rejected a *pourvoi*.¹

And in one of the clearest cases on the subject an owner of property had built a false chimney on his roof merely to darken a skylight in his neighbour's roof. The court ordered the chimney to be removed on the following grounds: considering that, if on principle the right of property is a right in a certain sense absolute, entitling the owner to use or abuse the thing, nevertheless the exercise of this right, as of every other, ought to have as a limit the satisfaction of a serious and legitimate interest, and the principles of morality and of equity are opposed to the law giving its sanction to an act inspired by malice, performed under the domination of an evil passion, not justified by any personal advantage to the person acting, and causing serious damage to another.²

In another singularly clear case an owner had erected a wooden screen ten feet high within three yards of his neighbour's house. It was held that it must be demolished, seeing that it was shown to have been erected out of malice, and was of no utility to the person who put it there.³

Similarly an owner of property is allowed to make noises thereon in a normal manner unless they are so intolerable as to amount to a nuisance. But he is not entitled to post his servants along the limits of his property with noisy instruments in order by an organised disturbance to frighten the game on his neighbour's land and spoil his shooting.⁴ In a somewhat similar case in England the scaring away of a neighbour's game with fireworks was held actionable as a nuisance.⁵

And in several French cases it has been held that an owner of property who allows game or, especially, rabbits to breed in large numbers, and does not take reasonable means to keep them down, is liable for damages done by them to his neighbour's crops.⁶ There

¹ Cass. 10 juin 1902, Dall. 1902. 1. 454.

² Colmar, 2 mai, 1855, Dall. 56. 2. 9.

³ Trib. de Sedan, 17 déc. 1901, Sir. 1904. 2. 217, where see the learned note by M. Appert.

⁴ Paris, 2 déc. 1871, D. 73, 2, 185. Dall. Supp. vo. Chasse, n. 1341.

⁵ Ibbotson v. Peat (1865), 3 H. & C. 644. See Carrington v. Taylor (1809), 11 East 571, 11 R. R. 270, and Keeble v. Hickeringill in the note. See Pollock, Torts, 7 ed., 329. *Secus* as to preventing rooks from resorting to a neighbour's trees, Hannan v. Mockett (1824), 2 B. & C. 934, 26 R. R. 591.

⁶ Cass. 14 mars 1905, Dall. 1905, 1. 270.

is in France a great body of jurisprudence on this point, and the principle has been applied to damage done by deer, hares, wild boars, foxes, wolves, badgers, and even pheasants and partridges.¹

A distinction is made between wild animals kept in an immoveable specially set apart for them, such as bees, pigeons kept in a dove-cot, or rabbits kept in a warren,² and wild animals which are in a state of freedom.³

And it is the view of most writers that when wild animals are kept in an enclosure surrounded by walls or palisades which do not allow them to escape, they fall under the same rule as the rabbits in a warren or the doves in a dove-cot. Their owner is responsible for damage done by them without proof of fault on his part. His liability is governed by C. C. 1055 (C. N. 1385).

But in the case of the wild animals which are free to roam over the country the liability of the owner of the land on which they breed depends upon fault.⁴ It must be shewn that he favoured their multiplication, or failed to take reasonable measures to keep them down. So long as they are kept within moderate limits there is no liability, even though they cause a certain amount of damage.⁵

In England the law is in an unsatisfactory state. It was held in one case by a Divisional Court that an action would lie against a person overstocking land with game so as to cause damage to a neighbour.⁶ Pollock, B., said this was not so much negligence as an infraction of the rule: *sic utere tuo ut alienum non laedas*. But in an old case it was decided that "if a man makes coney-boroughs in his own land which increase in so great number that they destroy his neighbour's land next adjoining, his neighbour cannot have an action, for so soon as the coneys come on his neighbour's land he may kill them, for they are *ferae naturae* and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he had no property, and which the other may lawfully kill."⁷

But in the French law and the law of Quebec rabbits in a warren are private property (C. N. 564; C. C. 428).

Mr. Beven distinguishes Boulston's case from the case of Farrer

¹ See Dall. Supp. vo. Chasse, nos. 1346 seq. Rép. eod. vo. n. 196.

² See C. C. 428.

³ Dall. Supp. vo. Chasse, l. c.

⁴ *Ibid.* n. 1354.

⁵ Req. 24 déc. 1883, D. 84. 5. 431, D. Supp. Chasse, n. 1350.

⁶ *Farrer v. Nelson* (1885), 15 Q. B. D. 258.

⁷ *Boulston's Case*, 5 Co. 104b., 77 Eng. Rep. 216.

on the ground that in the latter the game was brought to the land, whereas in the former the rabbits were naturally there and were merely harboured.¹ This seems a distinction which should not in principle affect the liability. Our courts would probably follow the French law on the subject.

Where malice is not alleged, cases regarding the uses of property which are forbidden to an owner as amounting to an interference with the equal rights of his neighbours are in our law grouped under the head of nuisance. In France such cases are often given as examples of the abuse of the right of property — *un usage abusif de son immeuble*.² Cases where an owner of property has demanded the suppression of certain works erected by his neighbour contrary to some provision of law but not causing any damage to the plaintiff, have been referred to the same principle.³ A similar question arises when an owner in building upon his land innocently encroaches, it may be by only a few inches, upon the land of his neighbour of which he had not previously been in possession. Can the neighbour insist on his pulling down his house?

In one French case, where it was only the foundations of a building which encroached and no damage was caused, the Court of Limoges refused to order demolition or to award damages.⁴ In most cases the question is complicated by considerations of the good or bad faith of the builder, and, where he is in good faith, there will generally have been such acquiescence on the part of the neighbour as will bar his claim for demolition. He will have to be satisfied with payment of a reasonable indemnity for his land which has been occupied.⁵ But where the circumstances do not lead to any inference of acquiescence, as, *e. g.*, when the owner whose land was encroached upon was absent, and did not know anything about the building, can he claim that he has become owner by accession of the part of the building which stands upon his land or can he compel its demolition?

It has been suggested that such claims might be met by the defence that they were abusive.⁶ Demolombe cites some old cases on the subject to the effect that when no acquiescence was

¹ 1 Negligence, 3 ed., 524.

² See Limoges, 5 févr. 1902, Dall. 1902. 2. 95.

³ See note by M. Appert to Sir. 1904. 2. 217 at p. 218, 2nd col.

⁴ Cass. 28 oct. 1891, Dall. 92. 1. 285.

⁵ Delorme *v.* Cusson, 1897, 28 S. C. R. 66; Dansereau *v.* Dansereau, 1906, 29 S. C. 411 (C. R.) See Baudry-Lacantinerie et Chauveau, Des Biens, n. 377.

⁶ See M. Charmont, in Rev. Trim. 1902, p. 117.

proved demolition must be ordered if demanded.¹ M. Planiol thinks that if the builder was in good faith, the demolition cannot be claimed. They are improvements made by a possessor in good faith, and become the property of the owner of the land on which they were made subject to his paying the cost or the plus-value.²

But as he can choose between these, and as the encroachment will probably have diminished rather than increased the value of his land, this solution is far from satisfying the equities of the case. The German code has an article on the subject: "When an owner in erecting a building has exceeded the boundary of his land, without intention or gross negligence, his neighbour must suffer the encroachment unless he have protested against it before the transgression of the boundary or immediately after. He is entitled to an indemnity in the shape of a rent. The amount of this rent must be fixed with regard to the date of the encroachment."³ And the owner entitled to this rent can claim, at any time, that the owner of the building shall take over the land occupied by it and pay its value at the time of the encroachment.⁴

In England it seems to be settled that an owner can make with impunity a malicious use of property. In the leading case the headnote is, "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."⁵ This case followed an earlier judgment of the House of Lords to the effect that an owner has a right to sink wells even though this should cut the veins of his neighbour's springs.⁶

In that case Lord Wensleydale says the English law on the question of malicious use of property is different from the civil law. "The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, — *animo vicino nocendi*."⁷

It is worth observing that in neither of these cases was there any proof of malice. In *Chasemore v. Richards* the well was sunk to supply water to a town, and in *Mayor of Bradford v. Pickles* the motive was, apparently, to compel the corporation whose reservoir

¹ v. 9, n. 691 *ter.* p. 657.

² Tr. Elém. 4 ed. v. 1, n. 2735.

³ B. G. B. art. 912.

⁴ Ib. art. 915. See Cosack, Lehrbuch, v. 2, p. 154.

⁵ *Mayor of Bradford v. Pickles*, [1895] A. C. 587, [1895] 1 Ch. 145.

⁶ *Chasemore v. Richards* (1859), 7 H. L. C. 349. ⁷ *Ibid.* at p. 388.

was fed by springs under Mr. Pickles' land to buy his land in order to preserve the supply.

But in England it seems to be accepted that the legality of the exercise of a positive right is not to be tested by asking with what motive it was done.¹ But the positive right may be a right for certain purposes only. Thus, where a person has a right to enter on land only for certain purposes his use of the land for other purposes will make him a trespasser.

In England the soil of the highway is, as a general rule, vested in the owners of the land through which it runs. The public right is merely a right of passage. So a man who stationed himself on a highway, which crossed a moor, for the purpose of using it to interfere with the shooting by preventing the grouse from flying in a particular direction was held to be a trespasser.²

In America the decisions are extremely inconsistent on the question of the legality of the malevolent draining of springs or erection of spite-fences. In some states these malicious acts are prohibited by statute.³ In a large number of cases it has been held that rights of ownership are not to be exercised for mere malice.⁴ But in many others the rule is followed that unless the act itself is illegal no question can be entertained as to the motive with which it was done. Thus in a New York case the defendant dug a ditch through an embankment which surrounded a spring upon his own land, not for his own benefit, but with the intent to divert the water from the plaintiff's well. It was held by the Court of Appeals that there was no cause of action, and the intent was immaterial.⁵

Mr. Ames argues against the doctrine of absolute rights and says "there are many limitations upon the right of ownership at common law, and, it is submitted, there is no difficulty in principle in limiting an owner's right so far that he shall not be permitted to use his land in a particular way with no other purpose than to damage his neighbour."⁶

¹ See *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. at p. 766, per Lord Penzance; *Allen v. Flood*, [1898] A. C. 1 H. L.

² *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142 (C. A.). Followed in *Hichman v. Maisey*, [1900] 1 Q. B. 752 (C. A.).

³ See 12 Am. & Eng. Encyc. L., 2 ed., 1058; 21 *ibid.* 688.

⁴ *Greenleaf v. Francis* (1836), 18 Pick. (Mass.) 117; *Wheatley v. Baugh*, 25 Pa. St. 528; *Chesley v. King*, 74 Me. 164.

⁵ *Phelps v. Nowlen* (1878), 72 N. Y. 39. Cf. *Walker v. Cronin* (1871), 107 Mass. 555. See cases on both sides in Gould, Waters, 3 ed., § 290, and in article by Mr. J. B. Ames in 6 HARV. L. REV. 414.

⁶ *Ibid.*

It is, however, not only in regard to uses of property that the English law is more inclined than is the French to admit the absolute character of legal rights.

The doctrine of abuse of rights appears to be firmly established in France, and most if not all of the practical applications which have there been made of it would be followed in the law of Quebec.

In England, on the contrary, there are decisions in many branches of the law which clearly affirm the absolute character of legal rights, irrespective of the motives of the person who enforces them or of his want of legitimate interest. This is so in the case of rights of property, as has just been explained. It is so also in regard to the right to bring a civil suit. In the words of Bowen, L. J., "the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."¹ The plaintiff in such a vexatious or malicious suit cannot even be condemned to pay the defendant's "extra costs." He is only liable to pay the taxed costs as between party and party.²

Criminal prosecutions, proceedings in bankruptcy against a trader or petitions for the winding up of a company are subject to a different rule because they involve a blow to reputation or credit.³

So a count for distraining for more rent than was due is bad, though it was alleged to be done maliciously.⁴ And in England the truth of defamatory words spoken or written is, if pleaded, a complete defence to a civil action for libel. The words may have been uttered maliciously and may have caused damage, but nevertheless, they are not actionable.⁵

In the law of Quebec the defence is not absolute. There must be public interest as well as truth to justify the uttering of the defamatory words.⁶

In a number of the American states there are statutes which provide that in actions for libel the truth is a complete defence only when it was published with good motives and for justifiable ends.⁷

¹ Quartz Hill Gold Mining Co. v. Eyres (1883), 11 Q. B. D. 674, at 690.

² *Ibid.*

³ See Pollock, Torts, 7 ed., 311.

⁴ Stevenson v. Newnham (1853), 13 C. B. 285, 93 R. R. 532.

⁵ See Odgers, Libel and Slander, 4 ed., 173.

⁶ See Trudel v. Viau, 1889, M. L. R. 5 Q. B. 502; Jeannotte v. Gauthier (1897), 6 Q. B. 520.

⁷ See a list of these states in 25 Cyc. 414.

And there are dicta of eminent judges in England which seem to lay down as a general principle that the legality of an act is by English law to be considered as not depending upon the motive with which it was done. It was said by Parke, B., "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."¹ And in the great case of *Allen v. Flood* there are important dicta to the same effect. Lord Watson said, "The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due."² And Lord Davey said, "it humbly appears to me to be against sound principle to hold that the additional ingredient of malicious motive should give a right of action against an individual for an act which if done without malice would not be wrongful although it results in damage to a third person." And Lord Macnaghten laid down the same general rule.³ But in spite of the high authority of the judges who expressed these opinions their soundness is open to serious question.⁴

There may be classes of cases in which from considerations of public policy the English law will not permit any inquiry into motives. The absolute rights of the landowner, the right of bringing a civil suit and the cases in the law of libel in which there exists an absolute privilege, such as that enjoyed by a legislator or a judge, are familiar examples.

On the other hand, there are other cases in which the motive makes all the difference between lawfulness and unlawfulness. This is so in malicious prosecution, in libel where there is a qualified privilege, in interference with business, and in inducing breach of contract, or in preventing a man from obtaining employment. A trader may ruin his rival by fair competition, but to carry on a business for no profit to himself but solely to ruin his rival would be unlawful.⁵

A trade-union may call out men on strike for a legitimate trade

¹ *Stevenson v. Newnham* (1853), 13 C. B. 285, 93 R. R. at 537.

² [1898] A. C. at 92. *Ibid.* at 172.

³ *Ibid.* at 151.

⁴ See, especially, the article by Mr. Ames, "How far an Act may be a Tort because of the Wrongful Motive of the Actor," in 18 HARV. L. REV. 411.

⁵ *Tuttle v. Buck*, 119 N. W. 946 (Minn.). See Lord Coleridge in *Mogul Co. v. McGregor*, 21 Q. B. D. at 553; Lord Bowen, *ibid.* at 618; Lord Morris, s. c., [1892] A. C. 49; Lord Field, s. c. 52. In America; *Walker v. Cronin* (1871), 107 Mass. at 564, and cases cited by Mr. Ames in 18 HARV. L. REV. 420. *Contra*, *Nat. Assurance Co. v. Cumming* (1902), 170 N. Y. 315, 326.

interest. But to threaten to strike if a particular workman is employed in order to put pressure upon him is unlawful.¹

Instead of saying that malice will not make a lawful act unlawful, is it not truer to say that wilful damage done to another is actionable unless there is some just cause or excuse for it? This was said to be a general rule of English law by Bowen, L. J.: "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse."² And Holmes, J., delivering the opinion of the Supreme Court of the United States, stated the same rule more fully: "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. . . . If this is the correct mode of approach, it is obvious that justifications may vary in extent according to the principles of policy upon which they are founded, and while some, for instance, at common law, those affecting the use of land, are absolute . . . others may depend upon the end for which the act is done."³

If this is, as Holmes, J., calls it, "the correct mode of approach," the difference between the English and the French law on the subject may be less wide than might at first appear.

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¹ *Giblan v. Nat. Amal. Labourers' Union*, [1903] 2 K. B. 600 (C. A.). *Nat. Assurance Co. v. Cumming*, *ut sup.*

² *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. at 422.

³ *Aikens v. Wisconsin* (1904), 195 U. S. 194, 204, referring to *Moran v. Dunphy* (1901), 177 Mass. 485, 487; *Plant v. Woods* (1900), 176 Mass. 492; *Squires v. Wason Manufact. Co.* (1902), 182 Mass. 137, 140, 141. See *L. Quart. Rev.*, 1906, p. 118; *Pollock, Torts*, 7 ed., 319.

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REMOTENESS OF VESTING AS THE TEST UNDER THE NEW YORK RULE AGAINST PERPETUITIES. — Professor Warren¹ recently raised three important questions as to the New York law of perpetuities. (1) If it be assumed that the Revised Statutes substituted the test of alienability for the common law test of remoteness in vesting, is there any limit to the doctrine that the power of alienation is not suspended, provided there are persons in being who can by joining convey the whole fee?² (2) Limitations of personalty to a class, the minimum membership of which is not necessarily determined within the statutory period, though the maximum is, have been held invalid.³ Is this a special narrow rule,⁴ or is it authority for the view that remoteness of vesting is the test, or are these cases to be treated as if in each one an invalid inalienable trust was attempted to be created, which could not be construed into an immediately vesting gift,⁵ and hence the decisions actually support the alienability test, although the language of the opinions favors the opposite view?⁶ (3) Is the last clause of § 40 of the Real Property Law⁷ permissive or restrictive?⁸

¹ See 30 Cyc. 1501 *et seq.*

² *Ibid.* 1505, n. 20. Suppose a devise to A for life, then to A's widow for life provided she was in being at testator's death, then further limitations: so far there has been no suspension of alienability, since all the females living at testator's death could join in a conveyance of the fee.

³ *Greenland v. Waddell*, 116 N. Y. 234; *Matter of Howland*, 75 N. Y. App. Div. 207; *Schlereth v. Schlereth*, 173 N. Y. 444.

⁴ That is, for example, on the ground that a vested estate, liable to be divested, is not "alienable." See *Matter of Howland*, *supra*.

⁵ *Fargo v. Squiers*, 154 N. Y. 250. See *Robert v. Corning*, 89 N. Y. 225.

⁶ See 30 Cyc. 1507, n. 29. See *infra*, n. 14.

⁷ "A fee or other less estate may be limited on a fee, on a contingency which if it should occur, must happen within the period prescribed in this article." L. 1896, c. 547,

⁸ See 30 Cyc. 1518, n. 81.

These questions Professor Warren considered fundamental and still unsettled. With one sweep the Court of Appeals has recently answered them all, and purported to settle the cardinal point as to whether alienability or remoteness is the test. *Matter of Wilcox*, 194 N. Y. 288. Personalty was bequeathed in trust to pay the income to W. for life, then the income was given to W.'s issue, and an undivided share of the principal to each of said issue at the age of 21, and in default of W.'s issue attaining 21, then over to living persons. The gift over was held bad for remoteness, though the alienability of the property was not suspended beyond W.'s life. The court fastens upon the clause which lies almost hidden in § 40,⁷ and construes it to establish a requirement that estates shall vest as well as become alienable within the statutory period. The principal reasons given for this construction are that the revisers were versed in the common law, which required vesting,⁸ that § 40 would otherwise be surplusage,¹⁰ and that the construction is settled by previous authority.¹¹ The court does not discuss the contrary authority.¹²

The main point has often hitherto been discussed, but rarely decided, for as most testamentary limitations involve a trust to collect and apply income, which is by statute inalienable even though trustee and *cestui* join in conveying,¹³ most of the decisions may be cited for either view.¹⁴ The language of the courts¹² and the writers,¹⁵ however, except with regard to the cases which elicited Professor Warren's second question, have generally appeared to take the alienability test for granted. A notable exception was Mr. Chaplin;¹⁶ and his reasoning the present case quotes and adopts. It may be assumed, therefore, that the court means to lay down (1) his rule, that the requirement as to vesting applies to "remainders"¹⁷ of realty, and to all

§ 40. The other material provision is § 32: "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, etc."

From the Personal Property Law: "The absolute ownership of personal property shall not be suspended, etc. . . . limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." L. 1897, c. 417, § 2.

⁹ Gray, *Rule against Perpetuities*, 2 ed., c. vii. *Contra*, Reeves, *Special Subjects in Real Property*, § 663.

¹⁰ The answer to this argument is well stated in 9 Colum. L. Rev. 338.

¹¹ The cases cited are *Oxley v. Lane*, 35 N. Y. 340; *Knox v. Jones*, 47 N. Y. 389; *Robert v. Corning*, 89 N. Y. 225; *Henderson v. Henderson*, 113 N. Y. 1; *Greenland v. Waddell*, 116 N. Y. 234.

¹² *Sawyer v. Cubby*, 146 N. Y. 192; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Emmons v. Cairns*, 3 Barb. (N. Y.) 243. See also *Mott v. Ackerman*, 92 N. Y. 539; *Thieler v. Rayner*, 115 N. Y. App. Div. 626; *Nellis v. Nellis*, 99 N. Y. 505; *Graham v. Graham*, 49 N. Y. Misc. 4; *Everitt v. Everitt*, 29 N. Y. 39.

¹³ *Everitt v. Everitt*, *supra*.

¹⁴ When personalty is bequeathed on trust to pay the income to A for life, then to A's issue till 21, then to convey to the issue, or over, the court may find the title vested in A's issue at birth, an intestacy as to the income, and a power in the trustee to convey: here only the validity of the gift over, not of the gift to the issue, squarely raises the point in question. But if the title does not vest in the issue at birth, because the testator intended the trustees to keep title and make the conveyance to the remaindermen, then to hold invalid either the limitation to the issue at 21, or the limitation over, may proceed from either test, since so long as the trustee has title, the power of alienation is suspended. It results that no case till the present has ever satisfactorily presented and discussed the question.

¹⁵ Gray, § 748; 30 Cyc. 1502; 1 Colum. L. Rev. 224.

¹⁶ Chaplin, *Suspension of Alienation*, §§ 1, 384, n. 3.

¹⁷ A "remainder" is a future estate dependent on a precedent estate. Chaplin, § 12.

estates of personality.¹⁶ However, several other different conclusions may be drawn from the opinion: (2) that only "remainders," whether realty or personality, need vest within the period; other future estates need only not suspend alienability. This would perhaps reconcile the leading case on the other side.¹⁸ (3) Or, that all future estates, of both kinds of property, are subject to the test as to vesting. This would hardly follow from § 40, which mentions only remainders of realty, but as to personality would be the effect of what this case calls the natural sense of "absolute ownership"; as to realty would necessitate the theory that the common law (except as to the period) is in force as to estates not covered by § 40. (4) Or finally, as the court admits, the principal case on its facts may be merely one where a limitation after an invalid trust is held bad,¹⁴ and hence the whole opinion dicta. It is needless to observe that this case, based on an obscure clause hardly before noticed, and on precedents not squarely in point, heedless of contrary authority and opinion, and careless in defining its own limits, seems unlikely to satisfy the bar of New York, however satisfactory the same result would be if achieved by legislative amendment.

CONSTITUTIONALITY OF A STATUTE REQUIRING THE SURRENDER OF UNCLAIMED BANK DEPOSITS TO THE STATE. — At common law the continued and inexplicable absence of a person from the jurisdiction for seven years was such *prima facie* evidence of death as to give the probate court jurisdiction to appoint an administrator to administer his estate.¹ But, even in a collateral suit, in the absence of statute, proof that he was alive at the time of the appointment of the administrator was sufficient to establish that the court had no jurisdiction and the administrator no authority.² Nor has a state power to declare by statute that a person absent and unheard of for a certain lapse of time shall be conclusively presumed to be dead so as to give a probate court jurisdiction; for this would constitute a taking of property without due process of law within the meaning of the Fourteenth Amendment.³ But a clear distinction is drawn between the administration of the estates of absentees and of those of deceased persons; and a Pennsylvania statute⁴ requiring, in addition to a reasonable presumption of death, adequate notice according to the circumstances, and reasonable safeguards for the return of the property to the absentee in case he should prove to be alive, was upheld by the Supreme Court on the ground that such administration is based primarily on the absence of the person whose estate is sought to be administered, and not upon his death.⁵

A Massachusetts statute has gone a step further.⁶ It provides that the probate court shall, at the request of the Attorney-General, order that all deposits with any savings bank or trust company to the credit of depositors which have remained unclaimed for more than thirty years and for which the depositor cannot be found be paid to the state treasurer, subject to be

¹⁸ *Sawyer v. Cubby*, *supra*.

¹ *Wentworth v. Wentworth*, 71 Me. 72.

² *Griffith v. Frazier*, 8 Cranch (U. S.) 9, 23; *Jochumsen v. Suffolk Savings Bank*,

3 *Allen* (Mass.) 87.

³ *Scott v. McNeal*, 154 U. S. 34.

⁴ *Laws of Pa.* 1885, p. 155.

⁵ *Cunnius v. Reading School*, 198 U. S. 458.

⁶ *St.* 1908, c. 590, §§ 56-57.

repaid to the person having and establishing a lawful right thereto, with interest at the rate of three *per centum per annum*. In a recent Massachusetts case a savings bank which had been paying four *per centum per annum* to its depositors contended that the statute was unconstitutional, since it impaired the obligation of contracts; but the contention was overruled and the statute upheld. *Attorney-General v. Provident Inst. for Savings*, 86 N. E. 912 (Mass.). The case seems difficult to support on principle. A statute that says that money owed by A to B shall not be owed by A, but shall be owed by C, impairs the obligation of a contract and deprives a man of his property without due process of law.⁷ And since the contract is changed without the parties' consent it is immaterial that something just as good is substituted in its place.⁸ It is further to be noted that the purpose of this statute differs from that of the Pennsylvania statute in that the latter is designed to protect the rights of the absentee's wife and children, his creditors, and next of kin, whereas the former is not designed to protect the heirs or creditors of the absentee but to be of pecuniary profit to the State. Its operation, furthermore, not only does not protect them, but is a positive injury; for it substitutes for a four *per centum* interest claim against the savings bank a three *per centum* claim against the state. And though it can not be denied that the state is entitled by escheat to the property of a person dying without heirs or devisees and that it has power to fix a reasonable statute of limitations, after which no claim to abandoned property shall be recognized, yet the Massachusetts statute is not of this sort, since it does not purport to bar the claim of the absentee. The real purpose of the statute is the pecuniary profit of the state, and though that is a worthy object, it is not one for which the police power can be exercised, especially when it impairs the obligation of a contract.

RIGHTS OF CREDITORS IN CORPORATE ASSETS. — It has long been a favorite doctrine with many American courts that the capital stock and other assets of a corporation constitute a "trust fund" for the benefit of its creditors.¹ This has been given as the basis of the right of creditors to compel stockholders to pay in full for stock issued to them as a bonus, or for less than the par value, under an agreement with the corporation that nothing more should be payable.² But it is now becoming generally recognized that this right, so far as it exists, rests on grounds of fraud.³ The doctrine has also been invoked in order to set aside a distribution of the corporate assets to the stockholders when debts are left unpaid,⁴ and to avoid a conveyance of the corporate assets to another corporation that is not a purchaser in good faith.⁵ But these two cases can be rested on the ordinary doctrines of fraudulent conveyances:⁶ it is unnecessary to resort to a fictitious trust.

As to what constitutes a fraudulent conveyance by a corporation, the test is the same as in the case of natural persons.⁷ Accordingly, a corporation

⁷ *Bank of Louisville v. Board of Trustees*, 83 Ky. 219.

⁸ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 662.

¹ *Woods v. Dummer*, 3 Mason (U. S.) 308. See 9 HARV. L. REV. 481.

² *Scovill v. Thayer*, 105 U. S. 143. See 22 HARV. L. REV. 319.

³ *Hospes v. Car Co.*, 48 Minn. 174.

⁴ *Woods v. Dummer*, *supra*. See *Angle v. Ry.*, 151 U. S. 1.

⁵ *R. R. v. Howard*, 7 Wall. (U. S.) 392.

⁶ See *Goddard v. Importing Co.*, 9 Col. App. 306.

⁷ See *Hamilton v. Quarry Co.*, 106 Wis. 352.

on the eve of insolvency may not give away its assets.⁸ And, like a natural person, in the absence of statutory provisions, it may give a preference to some of its creditors;⁹ although the opposite result has been reached under the trust-fund theory.¹⁰ So also a sale with intent to defraud or hinder creditors is voidable, as where the transferee is a new corporation whose stockholders are the same as those of the selling corporation.¹¹ But a sale in the ordinary course of business to a purchaser for value without notice cannot be set aside,¹² even though it be a sale of all the corporate assets.¹³ It was, however, held in a recent case that if the corporate assets were sold in return for stock of the purchasing corporation issued to the sole shareholder of the selling corporation individually, and by him pledged to individual creditors, the creditors may charge the assets so sold with an equitable lien in the hands of the purchasing corporation. *Luedecke v. Des Moines Cabinet Co.*, 118 N. W. 456 (Ia.). The court repudiates the trust-fund doctrine, which has been given as the basis for similar decisions,¹⁴ and properly rests the result on the ground that the transfer was a fraudulent conveyance, and the purchasing corporation not a *bona fide* purchaser. It is unnecessary to find any actual intent to defraud or delay the creditors, since the issue of the stock to the individual shareholder necessarily tends to deprive the corporation of its ability to pay its debts. The transaction is in effect a distribution of the corporate assets while debts are still unpaid, and the purchasing corporation is coöperating in the fraud. And although the creditor could follow the proceeds of the sale in the hands of the stockholder, that right is lost by a sale or pledge to a purchaser for value and without notice, and is clearly an inadequate remedy.¹⁵ A result similar to that of the principal case has been reached where the buying corporation gives no consideration except a promise to assume the debts of the selling corporation.¹⁶

REGULATION OF INTERSTATE COMMERCE BY THE COURTS PENDING INVESTIGATION BY THE INTERSTATE COMMERCE COMMISSION. — Prior to legislation by Congress interstate commerce was regulated under the common law, enforced in the state or federal courts.¹ At first the extension of common law principles to a subject in federal control was disputed,² but a decision of the Supreme Court settled this question.³ The common law required public carriers to charge a reasonable rate; and a recovery in damages for excessive charges was allowed the shipper.⁴ Consequently, when damages were inadequate, an injunction would be issued to prevent the establishment

⁸ *Morgan County v. Allen*, 103 U. S. 498.

⁹ *Farwell Co. v. Sweetzer*, 51 Pac. 1012 (Col.). See 11 HARV. L. REV. 550.

¹⁰ *Olney v. Land Co.*, 16 R. I. 597.

¹¹ *Central Ry. v. Paul*, 93 Fed. 878.

¹² See *Nat. Bank v. Texas Co.*, 74 Tex. 421.

¹³ *Warfield v. Marshall Canning Co.*, 72 Ia. 666.

¹⁴ *Hurd v. Laundry Co.*, 167 N. Y. 89.

¹⁵ See *Hibernia Co. v. St. Louis Co.*, 13 Fed. 516.

¹⁶ *Cole v. Iron Co.*, 133 N. Y. 164.

¹ Concerning the concurrent jurisdiction of state and federal courts, see Judson, *Interstate Commerce*, § 44.

² *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. 24. *Contra*, *Swift v. Philadelphia & Reading Ry. Co.*, 64 Fed. 59.

³ *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92.

⁴ *Murray v. Chicago & N. W. Ry. Co.*, *supra*.

or continuation of such charges.⁵ Moreover, because of the power invested in the federal government to regulate commerce, an injunction was granted at suit of the United States to restrain an interference with an interstate railroad,⁶ and in the opinion of two judges of the Supreme Court such a suit could have been instituted to prevent the exaction of an unreasonable rate.⁷ Thus the courts could in some measure have regulated interstate commerce even without congressional action.

When Congress first legislated on this subject, provision was made for an Interstate Commerce Commission to assist in the enforcement of the act, with quasi-judicial powers of investigation,⁸ and power to enforce through the federal courts the results of its investigations.⁹ But the carriers retained their power to fix rates in the first instance, subject only to the provisions of the act.¹⁰ Those provisions were in many respects merely declaratory of the common law,¹¹ and express provision was made that the existing common law remedies should remain.¹² Yet when suit was instituted prior to action by the Commission for the recovery of excessive charges or to enjoin an established rate as unreasonable, the circuit courts refused to act, on the ground that these common law rights had been impliedly repealed, because otherwise the purpose of the act would be destroyed.¹³ This argument is conclusive; for if, notwithstanding the provisions of the act for an investigation of any dispute by the Commission and for equal and uniform rates to all shippers, the courts could alter rates which they thought unreasonable, either the express provisions of the act forbidding discriminations would be nullified if the alteration were applied only to the parties in litigation; or if an injunction were issued for the benefit of all shippers, there would be no investigation by the experts of the Commission, since the decree of the court would be final. Moreover, as the determination of the reasonableness of a rate is a question of fact, divergent conclusions might be reached in different courts, with resulting discrimination and lack of uniformity. Similar considerations caused the circuit courts to refuse to grant a temporary injunction restraining the enforcement of an established rate until final action by the Commission.¹⁴

The Commission itself has no authority to issue such an order or secure its enforcement.¹⁵ So, to prevent an increase which might be unreasonable and might cause an irreparable injury to the shipper — and, it must be said, if so prevented, possibly to the carrier — some recent decisions draw a

⁵ *Menacho v. Ward*, 27 Fed. 529; *Southern Express Co. v. Memphis*, 8 Fed. 799.

⁶ *In re Debs*, 158 U. S. 564.

⁷ *Missouri Pacific Ry. v. United States*, 189 U. S. 274.

⁸ 25 Stat. at L. 858, § 3. The power of the commission is extended by later legislation. 34 Stat. at L. 584, § 4.

⁹ *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

¹⁰ *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific R. R. Co.*, 167 U. S. 479. The Commission can now establish a maximum rate. 34 Stat. at L. 584, § 4.

¹¹ 24 Stat. at L. 379, §§ 1, 2. See *Southern Ry. v. Tift*, 206 U. S. 428.

¹² 24 Stat. at L. 387, § 22.

¹³ *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 427; *Potlach Lumber Co. v. Spokane Falls Ry. Co.*, 157 Fed. 588.

¹⁴ *Great Northern Co. v. Kalispell Lumber Co.*, 165 Fed. 25. But the common law remedy to compel by injunction equal or impartial service is preserved. Such action, affecting only the parties in litigation, is not inconsistent with the creation of the Commission or the provisions of the act. *In re Lennon*, 166 U. S. 548, affirming 54 Fed. 746.

¹⁵ *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, *supra*.

distinction between altering an existing tariff and enjoining the establishment of a proposed new tariff, allowing an injunction in the latter case until the final determination of the reasonableness of the rates by the Commission.¹⁶ It is true such action does not involve any alteration of an existing tariff, but the result is in effect the same, and involves a judicial determination of the reasonableness of a rate without any investigation by the Commission, whereas the evident purpose of the legislation by Congress was to give complete jurisdiction to the Commission. Following this line of reasoning, the latest case on this question rejected the distinction made in all previous decisions and refused to temporarily enjoin the enforcement of a proposed new schedule pending investigation by the Commission. *Atlantic Coast Line Ry. Co. v. Macon Grocery Co.*, 166 Fed. 206 (C. C. A., Fifth Circ., Jan. 5, 1909). The Supreme Court has expressly left open the question of enjoining rates, established or otherwise,¹⁷ but it is submitted that, consistently with its present attitude,¹⁸ it should refuse to allow any action by the courts prior to the investigation provided for in the Interstate Commerce Act. The remedy should lie at the instigation of the Commission which conducts the investigation.¹⁹

THE LIABILITY OF PRINCIPALS FOR FRAUDULENT OVER-ISSUES BY THEIR AGENTS. — The liability of principals for tortious issues of bills of lading and certificates of stock by their agents has been rested on various grounds. Jurisdictions not only differ on the main principles, but differ as well in applying them to the various forms of these "quasi-negotiable" instruments. Under the broad principle of *respondeat superior* principals are held liable for torts committed by their agents within the scope of their employment.¹ In defining this scope, however, the courts separate. The English courts hold that it is not within the scope of an authority to issue such instruments fraudulently, nor to over-issue them, thus confining the principal's liability to cases where he might receive some benefit.² Lord Robertson, however, in a recent case, stated that he found it "extremely difficult on principle to hold that the scope of the agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it."³ The difficulty suggested seems insuperable. If it is possible to say that the principal did not authorize fraud, it would seem equally possible to say that he did not authorize other torts, including negligence.

Another ground for imposing liability is found in estoppel. The principal, having held out his agent as having authority, cannot later deny the authority. But the orthodox doctrine is that the extent of the authority is

¹⁶ *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 158 Fed. 193; *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Association*, 165 Fed. 1.

¹⁷ See *Southern Ry. v. Tift*, *supra*.

¹⁸ *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, *supra*.

¹⁹ The Commission has petitioned Congress for such power. 21st Annual Report of the Interstate Commerce Commission, p. 10.

¹ *Ry. Co. v. Bank*, 56 Oh. St. 351; *Schuyler v. R. R.*, 34 N. Y. 30, 49.

² *Whitechurch v. Cavanaugh*, [1902] A. C. 117; *Ruben v. Fingal Co.*, [1906] A. C.

439.

³ *Whitechurch v. Cavanaugh*, *supra*.

to be measured by the original delegation to the agent of the right to do certain things: that these things were to be done in a certain way does not prevent the existence of the authority to do the thing, and if the agent chooses a wrong way, the principal should none the less be responsible.⁴ Such reasoning seems preferable to the alternative reasoning that a principal is liable to an outsider only where the facts lie peculiarly within the knowledge of the agent and are not easily ascertainable by the outsider.⁵

In many cases of fraudulent over-issues, however, an independent tort liability is imposed on the principal as arising from his own negligence.⁶ There would seem to be such negligence where blank stock certificates are signed by one of the two necessary parties; for such previous signing is generally unnecessary to the prompt transfer of the certificates. But it is hard to find negligence in the mere giving of blank bills of lading to the master of a vessel, as otherwise it would be impossible for him to transact business.

Except as to this liability for negligence, it is difficult to agree with the many courts which make distinctions with varying results between bills of lading and certificates of stock. The agent acts within the scope of his employment in both cases alike; so that the principle of *respondeat superior* should equally apply. In both cases the facts are peculiarly within the knowledge of the agent and ascertainable with difficulty by a defrauded purchaser of the instrument. Each document is a continuing representation by the principal. Neither is strictly a negotiable instrument, yet both have become so by custom; and both alike are symbols of property; and the fact that the principal derives no benefit from negotiability should not prevent acknowledgment that there is now this general custom.⁷ A recent New York case refuses to apply the there recognized liability of principals on both bills of lading and stock certificates to certificates of indebtedness in the form of stock certificates issued by a cemetery corporation. *American, etc., Bank v. Woodlawn Cemetery*, 87 N. E. 107 (Ct., App.). The reasoning of the court that the reasons that make stock certificates negotiable do not apply to certificates of indebtedness is difficult to adopt; for in both the corporation would seem benefited by their negotiability. A further ground of dissent might be found in the unfairness resulting from allowing a denial that certificates in what appeared to be a negotiable form were not so in fact.

THE RESPONSIBILITY IN AMERICA FOR THE KEEPING OF ANIMALS. — The American cases on this subject, following the common law, have divided animals into two classes, *ferae naturae* and *mansuetae naturae* — a classification injected into the law of torts for the purpose of determining the liability of the owner or keeper of animals for their vicious acts. The decisions abound with the general statements that the owner or custodian of an animal *ferae naturae* is liable for any injury done by it to a third person

⁴ *Willis v. Fry*, 36 Leg. Int. (Pa.) 47; *W. Md. R. R. v. Franklin Bank*, 60 Md. 36.

⁵ *Allen v. R. R. Co.*, 150 Mass. 200.

⁶ *Allen v. R. R. Co.*, *supra*; *Titus v. Turnpike Rd.*, 61 N. Y. 237, 242; *Havens v. Bank*, 132 N. C. 214; *Moores v. Bank*, 111 U. S. 156. *Manhattan Life Ins. Co. v. 42d. etc., R. R.*, 46 N. Y. St. 130, *contra*, on the point that the purchaser was put on notice. See 18 HARV. L. REV. 144.

⁷ See 19 HARV. L. REV. 391.

irrespective of the owner's carefulness in the matter or of the gentleness of disposition previously displayed by the animal;¹ but that the owner of a domestic animal is not liable for its attack upon man or beast unless he knew of its vicious propensity.² Knowledge of an ugly disposition once having been proved, however, animals of the second class become *ferae naturae* for the purpose of determining the liability of the owner.³ That any such classification is illogical and incorrect seems amply demonstrated by Mr. Thomas Beven in a very able and instructive article, wherein he suggests that at common law "the rule of liability for the mischief done by animals *ferae naturae* is diverse; and the ground of the diversity is whether the mischievous agency is property or not," and maintains "that the liability of the owner of a savage beast is *prima facie* only, and may be rebutted by showing that the owner is wholly without fault."⁴

But our courts have established the great preponderance of authority that the keeper of a vicious animal is absolutely liable to any person who, without contributory negligence, is injured by such animal and that he cannot exonerate himself by showing that he used the highest degree of care in keeping or restraining the animal.⁵ According to some of these decisions the wrong consists in keeping the animal.⁶ The more cautious courts point out that the keeping of the animal is not the wrongful act; but then take refuge in the broad generalization that the owner is liable as an "insurer," and must at his peril keep it from doing harm.⁷ These same courts place a corresponding liability upon the owner of a domestic animal provided it can be proved that he had notice of the beast's wild or ferocious tendencies.⁸ It is conceived that those courts which are committed to the rule of the absolute liability of the owner or keeper of a vicious animal should, on the necessity for proof of *scienter* on the part of the owner or keeper, classify animals in general according to the prevailing public opinion as to their dangerous propensities.⁹ That the severity of the rule is not likely to be relaxed in these jurisdictions may be inferred from the fact that many of the legislatures have extended the common law liability of the owner of a dog so as not only to relieve the person injured from the burden of proving *scienter*, but even to impose upon the owner a penalty of anywhere from two to ten times the damages awarded by the jury.¹⁰

On the other hand four jurisdictions — New Jersey,¹¹ Vermont,¹² Ohio,¹³ and Minnesota¹⁴ — hold that the liability of the owner for injuries inflicted by a vicious animal is not absolute, but may be avoided by proving a diligence in restraining the animal commensurate with its known propensities. As put by the Ohio court "the gist of such an action as this is not the

¹ Vreedenburg v. Behan, 33 La. Ann. 627.

² Reed v. Southern Express Co., 95 Ga. 108.

³ Harris v. Carstens Packing Co., 43 Wash. 647.

⁴ 22 HARV. L. REV. 465, 468, 482.

⁵ Vreedenburg v. Behan, *supra*; Hayes v. Miller, 150 Ala. 621.

⁶ Woolf v. Chalker, 31 Conn. 121, 130-131.

⁷ Muller v. McKesson, 73 N. Y. 195.

⁸ Woolf v. Chalker, *supra*; Muller v. McKesson, *supra*; Marble v. Ross, 124 Mass.

44; Harris v. Carstens Packing Co., *supra*; Ahlstrand v. Bishop, 88 Ill. App. 424.

⁹ Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

¹⁰ E. g. Pub. Stat. N. H. 1901, § 370.

¹¹ De Gray v. Murray, 69 N. J. 458.

¹² Worthen v. Love, 60 Vt. 285.

¹³ Hayes v. Smith, 62 Oh. St. 161.

¹⁴ Fake v. Addicks, 45 Minn. 37.

keeping of the dog with knowledge of his dangerous nature, but rather the negligent failure to properly restrain the animal."¹⁵ It may further be added that with Mr. Beven such other eminent-writers on the law of torts as Bishop¹⁶ and Cooley¹⁷ support the views of these courts.

MARKETABLE TITLE IN EQUITY AND AT LAW.—If the vendor in a contract for the sale of land cannot furnish marketable title, equity will not decree specific performance. The burden of proof is upon the purchaser;¹ but in order to show title unmarketable, proof that it is in fact defective is not necessary;² the establishment of a certain degree of doubt in the mind of the court as to its validity will suffice. The reason for this departure from the ancient procedure whereby the chancellor, like the common law judge, had no discretion in the matter, but was wont to pronounce the title good or bad and decree or refuse specific performance accordingly, is, that as the decree of equity is *in personam*, it in no way binds parties not before the court.³

The doubt in the mind of the court may be based upon fact or upon law. It may be that a fact constituting an element in the vendor's chain of title cannot be,⁴ or is not, proven;⁵ or it may be that the happening of an event which would weaken the title is not improbable.⁶ In any case, if there remains in the mind of the court a doubt not remote,⁷ but rational,—such doubt as would deter a court of law from instructing the jury to find the facts upon which the vendor's title depends,⁸—the title is not marketable. For the purchaser, if compelled to take it, might have to defend against subsequent attack by parties not before the court; and a title depending for its validity upon a suit either at law or in equity is not marketable.⁹ Where the facts are admitted by demurrer and so settled for all purposes of the particular suit, as it is open to a party not before the court to show the facts to be different at a subsequent trial, the title may be unmarketable because doubtful in fact, although the precise question upon which the court hesitates is one of law presented by the demurrer.¹⁰

Again, the validity of the vendor's title may turn upon the establishment of a general principle of law,¹¹ or the construction of particular instruments,¹² or statutes,¹³ or the constitutionality of a statute,¹⁴ or the merits of a *lis pendens*,¹⁵—in all of which instances an adjudication involves passing upon

¹⁵ Hayes v. Smith, 62 Oh. St. 161, 182.

¹⁶ Bishop, Non-Contr. Law, 1225, 1230.

¹⁷ 2 Cooley, Torts, 3 ed., 696-697, 706-708.

¹ Rosenblum v. Eisenberg, 123 N. Y. App. 896, 899.

² See Spencer v. Sandusky, 46 W. Va. 582, 585.

³ See Gill v. Wells, 59 Md. 492; Richmond v. Gray, 85 Mass. 25.

⁴ Lowes v. Lush, 14 Ves. Jr. 547. See Shriver v. Shriver, 86 N. Y. 575, 585.

⁵ Fleming v. Burnham, 100 N. Y. 1, 11.

⁶ Kilpatrick v. Barron, 125 N. Y. 751, 755.

⁷ Tolosi v. Lese, 120 N. Y. App. 53, 59.

⁸ See Shriver v. Shriver, *supra*.

⁹ See Brokaw v. Duffy, 165 N. Y. 391, 399.

¹⁰ Abbott v. James, 111 N. Y. 673, 677.

¹¹ Taylor v. Chamberlain, 39 N. Y. Supp. 737.

¹² Cunningham v. Blake, 121 Mass. 333; Richards v. Knight, 64 N. J. Eq. 196, 204.

¹³ Daniel v. Shaw, 166 Mass. 582.

¹⁴ Daniel v. Shaw, *supra*.

¹⁵ Hayes v. Nourse, 114 N. Y. 595, 604. But see Linn v. McLean, 80 Ala. 360, 367.

the claim of a party not before the court. Accordingly, if the court is itself divided,¹⁶ or if it believes that there is reasonable ground for considering the question not settled by previous authorities,¹⁷ or if there are dicta of weight indicating that another court of competent jurisdiction might reach a different conclusion,¹⁸ the title cannot be called marketable.

The doctrine of marketable title is essentially an equitable one. In the absence of express stipulation a vendor was under an implied obligation at law to furnish only a "good" title,¹⁹ which originally meant a title not bad in fact though it might be doubtful.²⁰ But in England the courts of law have adopted the equitable doctrine, certainly where the title is doubtful in fact,²¹ and probably where it is doubtful as a matter of law.²² In this country a tendency in the same direction appears in one or two jurisdictions which have separate systems of law and equity.²³ And in those where the two systems are combined, the equitable doctrine has been expressly carried over into actions at law.²⁴ The effect of this extension is illustrated by a recent decision in favor of the plaintiff, where the plaintiff sued at law to recover an installment and the defendant asked specific performance. *Dixon v. Cozine*, 114 N. Y. Supp. 685. Decisions of this kind are rapidly obliterating the distinction at law between title "good" and title "marketable," even when only the former is expressly contracted for.²⁵

INDEMNIFICATION OF BAIL IN CRIMINAL CASES. — The defendant in a criminal case and his bail bear to each other the relation of principal and surety. A surety on a civil bond has, against his principal and co-sureties, the rights to indemnity,¹ contribution,² and, doubtless, subrogation,³ of sureties generally. Early cases make little distinction between civil and criminal sureties; their positions in these respects were probably once identical.⁴ Their obligations, however, are distinct: a civil surety undertakes that the principal shall perform his obligation;⁵ a criminal surety guarantees the appearance of his principal for prosecution.⁶ And on the ground that the chances of the prisoner's escape will be increased if his non-appearance involves no pecuniary loss to his bail, later courts have opposed the

¹⁶ *Abbott v. James*, *supra*.

¹⁷ *Cornell v. Andrews*, *supra*, p. 18.

¹⁸ *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 120.

¹⁹ *Souter v. Drake*, 5 B. & Ad. 992, 1002.

²⁰ *Boyman v. Gutch*, 7 Bing. 379, 392. See *Meyer v. Madreperla*, 68 N. J. L. 258, 268.

²¹ *Simmons v. Heseltine*, 5 C. B. N. s. 554, 571.

²² *Jeakes v. White*, 6 Exch. 873, 881. *Contra*, *Boyman v. Gutch*, *supra*. See *Simmons v. Heseltine*, *supra*.

²³ See *Colwell v. Hamilton*, 10 Watts, 413, 416; *Swayne v. Lyon*, 67 Pa. 436, 442; *Harrass v. Edwards*, 94 Wis. 459, 464; *Hollifield v. Landrum*, 31 Tex. Civ. App. 187. *Contra*, *Meyer v. Madreperla*, *supra*.

²⁴ *Moore v. Williams*, 115 N. Y. 586, 597; *Ladd v. Weiskopf*, 62 Minn. 29.

²⁵ See *Herman v. Somers*, 158 Pa. 424, 428; *Reynolds v. Borel*, 86 Cal. 538.

¹ *Fisher v. Fallows*, 5 Esp. 171.

² *Belldon v. Tankard*, 1 Marsh 6.

³ *Cf. King v. Bennett*, Wightw. 1.

⁴ *Comyn, Dig., Bail, Q. 1*; *Petersdorff, Bail*, 423.

⁵ *Stevens v. Bigelow*, 12 Mass. 433.

⁶ *Cripps v. Hartnoll*, 4 B. & S. 414.

creation of implicit, and the enforcement of explicit, obligations for the protection of a criminal bail.

It is well established that the surety by paying the bail bond obligation is not subrogated to the state's action against the accused.⁷ In England there is an implied obligation upon the principal to indemnify his surety for all costs reasonably incident to the relation, but not for damages sustained through his failure to appear.⁸ In a few American jurisdictions there may still be implied a general obligation to indemnify,⁹ but the prevailing view is the other way.¹⁰ And the courts of England, as also most American courts, refuse to enforce an express contract of indemnity made by the principal.¹¹ Where the law, by way of deliberate exception to general principles, declines to give a remedy, clearly it should recognize no attempt by the parties to create one.

In England contracts of indemnity by third parties are deemed as objectionable as express obligations of the principal.¹² In this country they are enforced.¹³ The argument given for the American distinction is that, if the obligation runs from a stranger, the state has still two independent sources of satisfaction.¹⁴ But so it has where the indemnification is to be by the principal; for the two promises remain to the state irrespective of any agreement between the principal and surety. It would seem as if there were a confusion of executory contracts to indemnify, with completed conveyances to facilitate qualification as bail¹⁵ — transactions on general grounds open to attack.¹⁶ In a recent decision a third party's promise to indemnify a criminal bail is upheld on principles broad enough to support all express obligations of that sort. *Carr v. Davis*, 63 S. E. 326 (W. Va.). It should be borne in mind, however, that the assurance to the state of the prisoner's appearance is the ultimate consideration of public policy in the institution of criminal bail. And this fact justifies a distinction between obligations to indemnify which run from the accused, and promises by third parties. That a bail indemnified by a stranger is under no greater incentive to prevent escape than one protected by the prisoner, is conceded. But the pressure upon an indemnifying third party is as strong as that upon any ordinary, unindemnified surety. And on a principle of substitution well recognized in this and kindred branches of the law, such an indemnifying third party seems entitled to all the necessary rights over the prisoner which the bail obtains from the state.¹⁷ Of course, where the third party is in turn to be indemnified by the prisoner, the situation is in effect that created by an express promise by the principal to his surety; each obligation should, accordingly, be declared unenforceable by parties cognizant of the general scheme.¹⁸ But

⁷ *United States v. Ryder*, 110 U. S. 729.

⁸ *Jones v. Orchard*, 16 C. B. 614.

⁹ *Reynolds v. Harral*, 2 Strob. (S. C.) 87.

¹⁰ See *Anderson v. Spence*, 72 Ind. 315.

¹¹ *Herman v. Jeuchner*, 15 Q. B. D. 561; *Ratcliffe v. Smith*, 13 Bush (Ky.) 172. *Contra*, *Simpson v. Robert*, 35 Ga. 180.

¹² *Consolidated Exploration, etc., Co. v. Musgrave*, [1900] 1 Ch. 37.

¹³ *Bird v. Washburn*, 27 Mass. 223.

¹⁴ *United States v. Greene*, 163 Fed. 442.

¹⁵ *Cf. Langlois v. Baby*, 11 Grant Ch. (U. C.) 21.

¹⁶ *Nicholls's Bail*, 1 Hodges 77.

¹⁷ See 11 HARV. L. REV. 541. The extraordinary powers of bail over his principal are perhaps best explained on a theory of subrogation to the state's rights. See *United States v. Ryder*, *supra*. On the general question of subrogation to public rights, see *Myers v. Miller*, 45 W. Va. 595. And *cf. Parsons v. Briddock*, 2 Vern. 608.

¹⁸ *Cf. Capon v. Dillamore*, 1 Bing. 423.

it is submitted that, apart from special facts, effect may properly be given to a transaction which, without materially impairing the state's assurance for the prisoner's appearance, lightens the burden of the criminal bail.¹⁹

RECENT CASES.

AGENCY—PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT—LIABILITY OF MEMBERSHIP CORPORATION FOR FRAUDULENT ISSUES OF STOCK CERTIFICATES.—The defendant was a membership corporation empowered to issue certificates of indebtedness in the form of stock certificates and whose shares were transferable only on the books of the company upon surrender of the certificate representing them. The treasurer of the company fraudulently issued to himself spurious certificates, constituting an over-issue and with no corresponding shares on the books. The plaintiff loaned money on these spurious certificates and sued the defendant for the damages occasioned thereby. *Held*, that the defendant is not liable. *American, etc., Bank v. Woodlawn Cemetery*, 87 N. E. 107 (N. Y., Ct. App.). See NOTES, p. 526.

AGENCY—UNDISCLOSED PRINCIPAL—ELECTION TO SUE EITHER AGENT OR PRINCIPAL.—The plaintiff contracted with the agent of an undisclosed principal. After disclosure he sued the principal to judgment; but not obtaining satisfaction, he then sued the agent. *Held*, that suing the principal to judgment constitutes a conclusive election which discharges the agent. *Murphy v. Hutchinson*, 48 So. 178 (Miss.).

One who contracts with the agent of an undisclosed principal may sue either the agent or the principal. *Paterson v. Gandasequi*, 15 East 62. Nothing short of suing to judgment seems to constitute an election. *Cobb v. Knapp*, 71 N. Y. 348. See *Curtis v. Williamson*, L. R. 10 Q. B. 57. And it has even been held that satisfaction of a judgment against one is necessary to discharge the other. *Beymer v. Bonsall*, 79 Pa. St. 298. *Contra, Priestly v. Fernie*, 3 H. & C. 977. It has been suggested that there is no doctrine of election, but that the cause of action becomes merged in judgment secured against either. See 14 HARV. L. REV. 68. *Cf. Jansen v. Grimshaw*, 125 Ill. 468. But if the principal remains undisclosed when judgment is entered against the agent, the principal is not discharged. *Greenburg v. Palmieri*, 71 N. J. L. 83; *Rommel v. Townsend*, 31 N. Y. Supp. 985. This result, though inconsistent with the theory of merger, is desirable; for the same considerations of fairness that gave rise to this right to elect sustain its continuance until it has been consciously exercised, or satisfaction received. The doctrine of election thus seems to be the more satisfactory doctrine. The rule that only a judgment secured with knowledge of all the facts constitutes an election is often applied in analogous cases where one has an election of remedies. See *Moore v. Sanford*, 151 Mass. 285; *Garrett v. Farewell*, 199 Ill. 436.

ALIENS—NECESSITY OF RESIDENCE FOR NATURALIZATION BY MARRIAGE.—A resident alien sought naturalization papers. At the time of his application, his wife, who had never been a resident in this country, was detained by the immigration authorities because of a contagious disease. The petition for naturalization was opposed on the ground that by virtue of the act providing that "Any woman who is now, or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen" (U. S. Comp. St. (1901), p. 1268, § 1994), the naturalization of the husband would secure the admission of his wife. *Held*, that as the act of Congress is not to be construed as applying to non-resident aliens, the natu-

¹⁹ *Cf. Belond v. Guy*, 20 Wash. 160.

ralization of the husband would not confer citizenship on the wife. *In re Rustigian*, 165 Fed. 980 (C. C., D. R. I.).

At common law an alien woman acquired no rights of citizenship by marriage with a citizen. *Count de Wall's Case*, 6 Moore P. C. 216. However, by the above statute passed by Congress the status of marriage with a citizen invests an alien woman with citizenship. *Dorsey v. Brigham*, 177 Ill. 250. And it makes no difference that the husband acquires his citizenship after the marriage. *Kelly v. Owen*, 7 Wall. (U. S.) 496. Naturalization by marriage secures as complete citizenship as that acquired by judicial proceedings. *Leonard v. Grant*, 5 Fed. 11. And the usual statutory requirements of age, education, and moral character are dispensed with. *Renner v. Mueller*, 57 How. Pr. (N. Y.) 229. Moreover, the courts have uniformly held that residence in this country is not essential. *Kane v. McCarthy*, 63 N. C. 299; *Ware v. Wisner*, 50 Fed. 310. But the State Department, to avoid conflicts in international law, has disregarded these decisions. 3 MOORE, INT. LAW DIG. 485-487. In the single previous case in which any question as to the immigration laws arose, a marriage during detention removed the cause for exclusion under such laws in addition to conferring citizenship. *Hopkins v. Fachant*, 130 Fed. 839. The difficulty presented in the main case is therefore a new one. That the act should be so construed as to admit persons otherwise excluded by the immigration laws seems unreasonable. Hence the interpretation that residence is necessary reaches the better result. Cf. *Zartarian v. Billings*, 204 U. S. 170.

ANIMALS — TRESPASS ON REALTY BY ANIMALS — LIABILITY OF OWNER.

— A's bull wandered from his land on to B's, and there injured C, a licensee. A had no knowledge of the vicious propensities of the bull, and it was not proved that he was guilty of negligence. C sought to recover on the ground that the bull was a trespasser, and that therefore the owner was absolutely liable for any injury irrespective of negligence. *Held*, that C is not entitled to recover. *Peterson v. Conlan*, 119 N. W. 367 (N. D.).

At common law the owner of cattle was bound at his peril to keep them from trespassing upon the land of another. *Bilen v. Paisley*, 18 Ore. 47. And with those states excepted which hold that the common law is inapplicable to their conditions, all jurisdictions agree that the owner is liable for the natural and probable results of the trespass irrespective of negligence. *Pace v. Potter*, 85 Tex. 473; *Lyons v. Merrick*, 105 Mass. 71. But there is a conflict of authority as to whether the owner of cattle ignorant of their vicious disposition is liable for injury to the property or person of the landowner that could not have been anticipated. Those jurisdictions imposing an absolute liability proceed upon the theory that damages for the special injury may be recovered as aggravated damages growing out of the primary trespass. And this right has been extended to a licensee. *Troth v. Wills*, 8 Pa. Sup. Ct. Rep. 1. This extension is difficult to support, for a licensee has no primary right arising from the trespass. It is submitted that a rule of law is too severe which casts upon the non-negligent owner of cattle a liability for mischief that could not have been anticipated. *Klenberg v. Russell*, 125 Ind. 531.

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — DECISION BY DIVIDED COURT. — On appeal from the judgment of a trial court, admitting a will to probate, three judges voted to affirm; four were for granting a new trial, — one on the ground of undue influence, one on the ground of testamentary capacity, and two on both grounds. There was not a majority for reversal on any one ground. *Held*, that the judgment must be affirmed. *In re McNaughton's Will*, 118 N. W. 997 (Wis.).

In the absence of statutory or constitutional modifications, it is well settled that the decision of a majority of the judges sitting in an appellate court is conclusive. *Gibbons v. Ogden*, 5 N. J. L. 1005. Nor is it necessary that their conclusions be based on the same grounds. *Smith v. United States*, 5 Pet. (U. S.) 292, 303. The court in the principal case departs from this rule where

the majority favor a reversal on different grounds; for otherwise, it is said, the trial court would have no guide to follow upon a rehearing. The authorities cited do not support this view, nor can it be upheld on theory; for it ignores the distinction between the judgment of the court and the opinions of the judges. *Houston v. Williams*, 13 Cal. 24. A statute may require a separate writ of error for each objection, or that each be passed on separately by the court. See PUB. GEN. LAWS OF MD., Art. 5, §§ 4, 9. The majority must then agree on some specific ground for reversal, or the judgment will be affirmed. This result, however, should only be reached by statute, and not, as in the principal case, by an illogical exception to a general rule.

BAIL — CONTRACT WITH THIRD PARTY TO INDEMNIFY SURETY ON BAIL BOND. — The plaintiff was surety on a bail bond for the appearance of one accused of felony. The defendant gave bond to indemnify the plaintiff against loss by reason of the recognizance. The prisoner failed to appear, and execution was awarded against the plaintiff upon the recognizance. *Held*, that the defendant is liable to the plaintiff upon his bond. *Carr v. Davis*, 63 S. E. 326 (W. Va.). See NOTES, p. 530.

BILLS OF LADING — EFFECT ON TITLE OF BILL "TO ORDER — NOTIFY." — The vendor of goods shipped them under a bill of lading to its own order with directions to notify the purchaser. The bill of lading was subsequently endorsed to the purchaser and by the latter to the plaintiff. A connecting carrier failed to notify the named purchaser, and delivered the goods to a stranger without surrender of the bill of lading. *Held*, that the connecting carrier is liable to the plaintiff for conversion. *National Bank of Commerce of Kansas City v. Southern Ry. Co.*, 115 S. W. 517 (Mo., Kan. City Ct. App.).

It is well settled that a transfer of title is effected by the endorsement and delivery of order bills representing goods in a carrier's hands. *Commercial Bank v. Armsby Co.*, 120 Ga. 74. Accordingly, a carrier is a converter if the holder of the bill is deprived of the goods by a wrongful delivery or failure to deliver. *Shellenberg v. Fremont, etc.*, R. R. Co., 45 Neb. 487. Different considerations apply to goods shipped on "straight" bills. *Merchants' National Bank v. Chesapeake, etc., Steamboat Co.*, 102 Md. 573. For where a carrier has promised delivery simply to a named consignee, the instrument is in effect no more negotiable than a simple promise to a named payee. Though an assignee of such a bill may be deemed the owner of the goods, business custom authorizes delivery by the carrier to the consignee named in a "straight" bill without surrender of the document. *Forbes v. Boston, etc., Railroad Co.*, 133 Mass. 154. But a bill "to order — notify" is as negotiable as any order bill. *Atlantic, etc., Bank v. Southern Railway Co.*, 106 Fed. 623. And all authority agrees with the principal case in its conclusion that a direction inserted as a protection to the owner of the goods in no way relieves the carrier of liability for their loss. *Furman v. Union Pac. R. R. Co.*, 106 N. Y. 579.

CONFLICT OF LAWS — CAPACITY — CONTRACTS CONCERNING LAND IN FOREIGN COUNTRY. — In November, 1903, the defendant in England agreed to give to the plaintiffs, as security for advances made to her husband, two mortgage bonds to be charged on her real property in the Transvaal. In December, 1906, the defendant appointed the plaintiffs' manager to be her attorney to mortgage or transfer the property to the plaintiffs. A married woman was prohibited, by the law of the Transvaal, from becoming surety for her husband, unless certain formalities were complied with. There had been no such compliance by the defendant. The plaintiffs brought this action for specific performance of the agreement of November, 1903. *Held*, that the agreement is void and that the plaintiffs' action therefore fails. *Bank of Africa v. Cohen*, 25 T. L. R. 285 (Eng., Ch., Feb. 4, 1909).

Capacity to convey or encumber land, either directly or through an attorney, clearly depends upon the *lex loci rei sitae*. *Swank v. Hufnagle*, 111 Ind. 453;

Linton v. Moorhead, 209 Pa. 646. But the view of the court, that capacity to make an executory contract with reference to immovables, is necessarily determined by the same law, seems open to question. *Polson v. Stewart*, 167 Mass. 211. But see DICEY, CONF. OF LAWS, 517. The contract, in so far as it may create a personal obligation, should be governed by the *lex loci contractus* and relief in *personam* should be granted regardless of the law of the situs. *Finnes v. Selover, etc., Co.*, 102 Minn. 334. See *Polson v. Stewart, supra*. The form of the relief relates merely to the remedy and depends upon the law of the forum. Thus, a court of equity has power to order a conveyance of foreign land as a remedy for the breach of a merely personal obligation. *Lord Cranstown v. Johnston*, 3 Ves. 170; *Ex parte Pollard*, Mont. & C. 239. See *Scott v. Nesbitt*, 14 Ves. 438. The decree, however, is without force unless the defendant has, by the law of the situs, capacity to make the conveyance. The sovereign of the situs, moreover, must have consented that a deed should pass title wherever made. See 20 HARV. L. REV. 392. In civil law jurisdictions a conveyance of land is usually ineffective unless it is registered in the country of the situs. A foreign court cannot order such registry and cannot, therefore, irrespective of capacity, make an effective decree. See 21 HARV. L. REV. 210; 21 *ibid.* 354.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — RIGHT TO INHERIT FROM ADOPTIVE PARENT'S RELATIVES. — A adopted B in Illinois, where a statute declares that "thenceforward the relation between such person and the adopted child shall be as to their legal rights and liabilities the same as if the relation of parent and child existed between them," except that the parent is not to inherit from the child. *Held*, that B cannot inherit land from A's deceased brother in Kansas. *Boaz v. Swinney*, 99 Pac. 621 (Kan.).

Without reference to its own law on this subject the court takes the sound position that as adoption statutes are in derogation of the common law rights of other relatives they are to be construed strictly, and not in accordance with Roman law, and that therefore the Illinois statute does not give the right claimed. For a discussion of these principles, see 22 HARV. L. REV. 372.

CONFLICT OF LAWS — RIGHT OF ACTION — STATUTORY RIGHT CONDITIONED ON COMMENCEMENT OF ACTION IN THE JURISDICTION. — The plaintiff was injured by the negligence of the defendant company in New Mexico. A statute of New Mexico provided that no liability should arise for personal injuries caused in the territory unless the injured party should commence an action in a court of the territory within one year. The plaintiff, without having brought suit in New Mexico, sued the defendant in Texas and recovered. The defendant contended that the Texas court, in maintaining jurisdiction of the case and refusing to enforce the New Mexico statute, denied the federal right guaranteed in the "full faith and credit" clause of the Constitution. *Held*, that no federal right was denied the defendant. *Atchison, etc., Ry. Co. v. Sowers*, U. S. Sup. Ct., March 1, 1909.

An action for personal injuries is transitory and may be brought wherever the defendant can be served. *Rafael v. Verelst*, 2 Wm. Bl. 1055. According to the weight of authority this is true even if the action is purely statutory. *Dennick v. R. R.*, 103 U. S. 11. It is for the law of the forum, not of the place conferring the right, to make it local or transitory; for the sovereign of the place conferring the right cannot confer it and at the same time take away the remedy in other jurisdictions. See 21 HARV. L. REV. 207. But a condition attached to the right by the sovereign conferring it follows it everywhere. *Davis v. Mills*, 194 U. S. 451. And in the principal case the statute did not forbid suits in foreign jurisdictions, but merely made the commencement of a suit in the territory a condition precedent to the right of action anywhere. Hence, unless the condition is invalid as denying due process, — and it is hard to see why it is, — the statute should be given full faith and credit in other states.

CONFLICT OF LAWS — RIGHTS IN PROPERTY — LAW GOVERNING MARITIME LIEN ACQUIRED IN FOREIGN PORT. — In a judicial sale in Scotland of a Scotch registered vessel, a party resident in New York claimed preferential ranking because of advances made for the repair of the vessel and the payment of seamen's wages while the vessel was in New York. The advances were made to the owners on their personal credit. *Held*, that the question whether the claimant has a lien on the vessel is determined by Scotch and not by American maritime law. *Clark v. Hine*, 45 Scot. L. R. 879.

As a general rule a maritime lien created by the *lex loci contractus* is enforceable everywhere, even when by the *lex loci fori* no such lien could have attached. *The Maggie Hammond*, 9 Wall. (U. S.) 435. Although this recognition of foreign law is a matter of comity, it is for the self-interest of commercial nations to uphold the sanctity of maritime liens. For otherwise marine hypothecations would be so insecure that the money necessary to enable a foreign vessel to complete her voyage would rarely be forthcoming. An exception to the general rule of maritime law is found in Louisiana, where the domestic law is applied to causes of action arising outside the state. *Owens v. Davis*, 15 La. Ann. 22. The same principle seems to have been invoked in the main case. The case may be rested also on the ground that the loans were made to the vessel owners on their personal credit. In these circumstances it is doubtful whether any lien attached to the ship. *The Haytian Republic*, 65 Fed. 120.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — STATUTE REQUIRING SURRENDER OF UNCLAIMED BANK DEPOSITS TO STATE. — A statute provided that all deposits in any savings bank or trust company to the credit of a person whose whereabouts was not known, for which no claim had been made for thirty years, should be paid over to the state subject to be repaid to the legal owner, with three per cent interest from the time it was surrendered to the state. The Attorney-General filed an application in the probate court, according to the statutory provision, for the surrender of unclaimed deposits in the hands of the defendant. *Held*, that the statute is constitutional. *Attorney-General v. Provident Inst. for Savings*, 86 N. E. 912 (Mass.). See NOTES, p. 522.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — ACT REQUIRING CORPORATIONS TO PAY EMPLOYEES MONTHLY. — A statute required corporations, etc., to pay certain employees monthly. *Held*, that the statute is unconstitutional. *Smith v. Ohio Oil Co.*, 86 N. E. 1027 (Ind.).

For a discussion of a similar case with an opposite result, see 21 HARV. L. REV. 444.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — RATE-MAKING AS A JUDICIAL OR LEGISLATIVE ACT. — The relators sued out a writ of certiorari to review the decision of a commission appointed to fix railroad rates as to the reasonableness of a rate not yet enforced. *Held*, that, the commission having acted judicially, the writ lies. *People v. Willcox*, 40 N. Y. L. J. 2365 (N. Y., Ct. App., Feb. 23, 1909).

This view is expressly opposed to the conclusion recently reached by the majority of the United States Supreme Court. See 22 HARV. L. REV. 368; cf. 21 *ibid.* 138.

CORPORATIONS — INSOLVENCY OF CORPORATION — FRAUDULENT CONVEYANCES. — A corporation sold all its assets to a second corporation, taking in payment stock of the latter issued to the sole stockholder of the selling corporation. The plaintiff was a creditor of the selling corporation at the time, as the purchasing corporation knew. The stockholder pledged the stock for his individual debts. *Held*, that the plaintiff may follow the assets into the hands of the purchasing corporation. *Luedecke v. Des Moines Cabinet Co.*, 118 N. W. 456 (Iowa). See NOTES, p. 523.

CORPORATIONS — TORTS AND CRIMES — CRIMINAL LIABILITY OF A CORPORATION. — The traffic manager of the defendant company entered into an unlawful agreement with the American Sugar Refining Company, giving it a rebate on goods shipped. The defendant company was indicted and convicted under the section of the Elkins act which imputes to the corporation the act of its agent acting within the scope of his authority. *Held*, that the defendant company may be convicted. *New York Central R. R. Co. v. United States*, U. S. Sup. Ct., Feb. 23, 1909.

There is no doubt that a corporation may be held for a violation of a statute which merely provides that whoever intentionally does the thing complained of shall be liable. *United States v. Kelso*, 86 Fed. 304. The law is not so clear, however, when the *mens rea* is a necessary element. The corporation has been held liable in tort for the wilful and malicious act of its agent. *Green v. Omnibus Co.*, 7 C. B. N. S. 290. And a corporation may be charged with punitive damages. *Samuels v. Evening Mail*, 75 N. Y. 604. It would seem that under modern conditions courts will hesitate to pursue further an artificial line of reasoning, based on the idea that corporations can do no wrong because they exist only in contemplation of law. Undoubtedly, by its very terms a statute may preclude the liability of corporations under it. *People v. Rochester Ry. & Light Co.*, 59 N. Y. Misc. 347. But there is no reason why the state, having created a corporation, may not impute to it an evil intent and hold it for its acts. Such is the trend of the more recent decisions, as where the corporation is charged with a conspiracy in restraint of trade. *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823.

CORPORATIONS — WHAT ACTS ARE ULTRA VIRES — CORPORATION ORGANIZED BY ANOTHER TO TAKE OVER ITS PROPERTY. — The stockholders of the defendant company passed a resolution that its board of directors should organize a new company and convey to it certain real estate belonging to the old company in consideration of the issuance to the defendant of all the capital stock of the new company, to be allotted to the defendant's stockholders in proportion to their then holdings. A non-assenting minority stockholder brought a bill in equity praying that the directors be enjoined from carrying out the terms of the resolution. *Held*, that the injunction be granted. *Schwab v. E. G. Potter Co.*, 40 N. Y. L. J. 2495 (N. Y. Ct. App., March 2, 1909).

If corporations could create new bodies to carry on their business, there might soon exist an endless chain of companies that would seriously prejudice the rights of minority stockholders. Clearly no reason exists for implying such a power as necessary to corporate existence. *Elyton Land Co. v. Dowdell*, 113 Ala. 177. Indeed the proposed scheme would have been *ultra vires*, even though the directors had merely been authorized to purchase shares in a corporation to be formed; for a corporation may not as a general rule become a stockholder in another corporation unless authorized by statute or by charter. *People ex rel. Moloney v. Pullman Co.*, 175 Ill. 125. The facts in the principal case do not bring it within the exception to this rule, for the stock here was not to be taken as payment or security for a debt. *Memphis R. R. v. Woods*, 88 Ala. 630; *Bank of India's Case*, L. R. 4 Ch. 252. It would seem, however, that such a scheme might be good as a means of dissolving the company if a non-assenting shareholder could at his option decline the new stock and get in cash the value of his share of the assets of the old company. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393.

DAMAGES — MEASURE OF DAMAGES — REMEDIES OF SERVANT ON WRONGFUL DISCHARGE. — The defendant contracted to employ the plaintiff for a term of five years at a yearly salary payable in monthly installments. After a few months' service the plaintiff was wrongfully discharged. He brought an action on the contract for such damages as he had sustained and might sustain up to the date of the trial, but without prejudice to his right to sue for damages subsequently accruing. Judgment was recovered for the amount of his salary to the time of trial. Before the expiration of the term

he brought a second action for damages accrued since the first trial. *Held*, that the former judgment is no bar to recovery. *Canada-Atlantic & Plant S. S. Co. v. Flanders*, 165 Fed. 321 (C. C. A., First Circ.).

The main case apparently marks the first appearance of the doctrine of "constructive service" in the federal courts. It is to be regretted that after the repudiation of this doctrine in England and in the majority of our states another case should be added to the few in its support. For a discussion of the principles involved, see 14 HARV. L. REV. 294; 12 *ibid.* 435. Confusion seems to have arisen in treating the case as one of anticipatory breach.

DANGEROUS PREMISES — LIABILITY TO TRESPASSERS — CHILD TRESPASSER ON TURNTABLE. — The plaintiff, a boy of four or five years, entered the defendant's premises through a gap in its boundary hedge. While playing with companions on the defendant's turntable, which was not fastened, the plaintiff was injured. The jury found that the hedge was in a defective condition through the defendant's neglect. *Held*, that the defendant is liable. *Cooke v. Midland Great Western Railway*, 53 Sol. J. & Wkly. Rep. 319 (Eng., H. L., March 1, 1909).

This decision reverses that of the lower court, commented upon in 21 HARV. L. REV. 57. The case is noteworthy as being the first turntable case in the English courts, and as committing them to the rule of the weight of American cases — a result perhaps not to be expected. Though the report is rather meager, it would seem that the House of Lords has adopted without demur the fiction of "implied invitation," "allurement," and "attractive premises."

ESTOPPEL — ESTOPPEL IN PAIS — ACKNOWLEDGMENT OF LIABILITY ON CERTIFICATE OF DEPOSIT. — The defendant bank issued a non-negotiable certificate of deposit to A, who assigned to B, who assigned to the plaintiff. Later, the defendant told B that the certificate would be paid. On suit brought, the defendant claimed a banker's lien to satisfy claims against A. *Held*, that since the defendant would be estopped to deny its liability as against B, it is estopped in this suit in order to avoid circuitry of action. *Old National Bank v. Exchange National Bank*, 26 Banking L. J. 119 (Wash., Sup. Ct., Sept. 24, 1908).

To raise an estoppel by misrepresentation there must be a misstatement of past or existing facts. A mere statement of intention is not enough. *Chadwick v. Manning*, [1896] A. C. 231; *Langdon v. Doud*, 10 Allen (Mass.) 433. Many instances where this rule is seemingly disregarded are in reality cases rather of contractual obligation than of pure estoppel. See *Coles v. Pilkington*, L. R. 19 Eq. 174, 177; EWART, ESTOPPEL BY MISREPRESENTATION, 69. The defendant bank's statement that it would pay the certificate is a mere statement of intention which is not binding in the absence of consideration. Moreover, in all cases, the one claiming the estoppel must have relied on the misrepresentation to his damage. *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188, 211. So, where the maker of a promissory note makes an assertion to one who has already purchased it, that he has no existing defense against the note, he is not thereafter estopped from setting up such a defense, since no damage has been suffered in reliance on the assertion. *Windle v. Canaday*, 21 Ind. 248; *First National Bank v. Chaffin*, 118 Ala. 246. Hence the defendant in the principal case should not be estopped as against B, and *a fortiori* there should be no estoppel as against the plaintiff to whom no representation whatever was made.

FEDERAL COURTS — JURISDICTION BASED ON NATURE OF SUBJECT MATTER — JOINT ACTION INVOLVING FEDERAL QUESTION. — A joint action was brought against a railway company, its engineer, and fireman, for causing the death of the plaintiff's husband. The company had been created by Act of Congress, while the co-defendants and the plaintiff were citizens of a single state. Application was made for a remission of the case from the federal to the state court. *Held*, that as a federal question is involved, the federal court has jurisdiction. *Matter of Dunn*, 212 U. S. 374.

Diversity of citizenship is a ground for federal jurisdiction under the statute for removal of causes. See ACT OF MARCH 3, 1887, § 1. But by judicial construction, all the defendants in a joint action must be citizens of states other than that of the plaintiff. *Alabama Great Southern Railway Co. v. Thompson*, 200 U. S. 206. Also, a case arising under the laws of the United States may be removed to a federal court; and a suit brought against a corporation created by Act of Congress, presents such a case. *Texas & Pacific Railway Co. v. Cody*, 166 U. S. 606. But if the same construction were put upon this ground for removal as upon the former, the presence of co-defendants who have no right to federal jurisdiction should prevent removal. But since the present joint action arises under the laws of the United States as to one defendant, the court holds that the whole case is permeated with a federal character. This is a logical interpretation of the language of the act in question; and it was correctly admitted that the action, brought in joint form, could not be separated by one defendant. *Alabama Great Southern Railway Co. v. Thompson*, *supra*. And in any case removal to the federal court must be under petition of all the defendants. *Chicago & Rock Island Ry. Co. v. Martin*, 178 U. S. 245.

GIFTS — GIFTS CAUSA MORTIS — PRESUMPTION OF UNDUE INFLUENCE FROM CONFIDENTIAL RELATIONS. — A gift *causa mortis* was made to a priest whose relations with the donor had been confidential. Held, that the gift is *prima facie* void. *Gilmore v. Lee*, 41 Chic. Leg. N. 217 (Ill., Sup. Ct., Dec. 15, 1908).

The existence of confidential relations between the parties to a gift *inter vivos* raises a presumption of undue influence. *Huguenin v. Basely*, 14 Ves. 273. But this doctrine is not applied to testamentary gifts. *Tyson v. Tyson*, 37 Md. 567, 583. See 14 HARV. L. REV. 73. One reason given for this distinction is that a testator is not impoverished by a bequest, and therefore may be legitimately influenced by considerations arising out of confidential relations. *Bancroft v. Otis*, 91 Ala. 279. See *Sparks' Case*, 63 N. J. Eq. 242, 248. On this reasoning a gift *causa mortis* should be treated like a will. But another explanation is that a greater degree of undue influence may reasonably be presumed in gifts than in wills, because one present and taking part in a transaction is better able to exercise coercion. *Haydock v. Haydock*, 34 N. J. Eq. 570; *Archer v. Hudson*, 7 Beav. 551. This explanation is supported by the strong tendency to apply to a will the presumption of undue influence when the legatee was active in procuring its execution. *Dale's Appeal*, 57 Conn. 127; *Sparks' Case*, *supra*. Furthermore a will is revocable, while a gift *inter vivos* is a finality. Failure to revoke a will indicates a continued assent and thus destroys the presumption. See *Miskey's Appeal*, 107 Pa. St. 611, 629. But a gift *causa mortis*, being made *in extremis*, is in fact practically beyond the donor's control. Hence there is no ground for distinguishing gifts *causa mortis* from gifts *inter vivos*. See *Thompson v. Heffernan*, 4 Dr. & War. 285.

INSURANCE — NATURE AND INCIDENTS OF INSURANCE CONTRACTS — RIGHT OF HOLDER OF LIEN TO INSURANCE MONEY. — A had a lien on lumber for sawing it from logs delivered to him by B. B had taken out a policy of insurance on the lumber payable to C, who had lent money on the security of the lumber. The lumber was burned. Held, that A has a lien upon the insurance money. *Chew v. Caswell*, 13 Ont. Wkly. Rep. 548 (Ont., Feb. 17, 1909).

A policy of fire insurance is a personal contract for the benefit of the assured and does not run with the property. *Quarles v. Clayton*, 87 Tenn. 308. So a mortgagee, as such, has no more right than any other creditor to the proceeds of a policy on the mortgaged premises for the benefit of the mortgagor, or of some other party having an insurable interest therein. *Columbia Insurance Co. v. Lawrence*, 10 Pet. (U. S.) 507. Unless there is an actual assignment of the policy to him, he can acquire a right only by contract with the assured. *Nichols v. Baxter*, 5 R. I. 491; *Nordyke & Marmon v. Gery*, 112 Ind. 535. The same rules apply to the holder of a mechanic's lien. *Galyon v. Ketchen*,

85 Tenn. 55. And the rights of the holder of a common law lien should be no greater. *Eichelberger v. Miller*, 20 Md. 332. Neither legal nor equitable title is necessary to an insurable interest, and the holder of a lien may insure to the extent of his claim. *Insurance Co. v. Stinson*, 103 U. S. 25; *Rohrbach v. Germania Fire Insurance Co.*, 62 N. Y. 47. Thus the plaintiff in the principal case might have protected himself fully, and there seems little reason to make any implication in his favor. See *Mosser v. Donaldson*, 10 Atl. 766 (Pa.).

INTERSTATE COMMERCE—CONTROL BY CONGRESS—ACTION BY THE COURTS PENDING INVESTIGATION BY INTERSTATE COMMERCE COMMISSION.—The plaintiffs were shippers on the defendant railroad which filed notice of a new schedule of rates. The plaintiffs, claiming that the new rates would cause irreparable injury, sued in equity to prevent their establishment pending a determination of their reasonableness by the Interstate Commerce Commission. *Held*, that the bill be dismissed. *Atlantic Coast Line Ry. Co. v. Macon Grocery Co.*, 166 Fed. 206 (C. C. A., Fifth Circ., Jan. 5, 1909). See NOTES, p. 524.

MORTGAGES—EQUITY OF REDEMPTION—MORTGAGEE'S RIGHT TO CONSOLIDATE MORTGAGES.—The owner of certain lots of land mortgaged them to the defendant. The equities of redemption he assigned to the plaintiff, who later acquired the equity of redemption in another lot, also mortgaged to the defendant, but not by the same mortgagor, and expressly excepted from the provisions of the Conveyancing Act, 1881. The plaintiff tendered the amount due on this last mortgage, but the defendant claimed the right to consolidate all the mortgages. *Held*, that the plaintiff may redeem this mortgage separately. *Sharp v. Rickards*, 99 L. T. R. 916 (Eng., Ch., Nov. 11, 1908).

It was formerly well established law in England that when a mortgagee acquired several mortgages on various estates, all given by the same mortgagor, he could consolidate his claims as against either the mortgagor or his assignee. *Vint v. Padget*, 2 De G. & J. 611. This rule was based on the ground that he who seeks equity must do equity, but its justice in practice was frequently questioned, and it was abolished by the Conveyancing Act, 1881, except where the right was expressly reserved in one of the mortgage deeds. 44 & 45 VICT. c. 41. The general rule in our courts has always been that a mortgagee can only demand payment of the debt due and covered by the mortgage sought to be redeemed. *Cohn v. Hoffman*, 56 Ark. 119. But the mortgagee has been allowed to consolidate a claim arising out of the same transaction in which the mortgage was given; so also a claim for money expended in protecting the property or title. *Burgett v. Osborne*, 172 Ill. 227; *Robinson v. Ryan*, 25 N. Y. 320. The principal case recognizes that on equitable grounds the English rule in so far as it still prevails should not be extended to a case where the mortgages were executed by different mortgagors.

MUNICIPAL CORPORATIONS—OFFICERS AND AGENTS—EFFECT OF RE-ELECTION AFTER OUSTER.—The charter of New York City provided that the president of a borough, an officer chosen by popular vote, might be removed for cause by the governor, and that a vacancy should be filled by a majority of the aldermen from the borough. The defendant, having been so removed, was immediately selected by the aldermen for the remainder of his original term. *Held*, that he is not entitled to the office. *People v. Ahearn*, 40 N. Y. L. J. 2477 (N. Y., App. Div., March, 1909).

For a discussion of the principles involved, see 20 HARV. L. REV. 316.

NEW TRIAL—GROUNDS FOR GRANTING NEW TRIAL—ERRONEOUS INSTRUCTION MERELY AS TO DAMAGES.—A statute prescribed "a new trial" as the remedy for prejudicial error committed during a trial, but neither expressly authorized nor expressly prohibited retrial of part of the issues. After

verdict for the plaintiff, retrial was ordered solely for error in the instructions to the jury as to the measure of damages. *Held*, that a new trial upon all the issues, resulting in a verdict for the defendant, is not error. *Cerny v. Paxton and Gallagher Co.*, 119 N. W. 14 (Neb.).

A new trial as a remedy for prejudicial error is of comparatively modern development in the common law. See *Bright v. Eynon*, 1 Burr. 390; 3 BL. COMM. 388, 390. Retrial of all the issues has never been a matter of right, the court having discretion to confine it to particular issues. See *Hutchinson v. Piper*, 4 Taunt. 555. A new trial is but a means to an end, the correction of error. Hence, when error affects but one issue, which is readily separable and which can be examined without considering the general merits of the case, the new trial should be limited to that issue. *Benton v. Collins*, 125 N. C. 83. But see *Edwards v. Lewis*, 18 Ala. 494. This is true when issues have been separately submitted to the jury. *Mitchell v. Mitchell*, 122 N. C. 332. The issue upon a single plea may be retried; or, merely the question of damages. *Third Natl. Bank v. Owen*, 101 Mo. 558, 585; *Boyd v. Brown*, 17 Pick. (Mass.) 453, 461. The opposite rule, taken by the principal case, clogs the courts with useless litigation, subjects the state and the parties to unnecessary expense, and deprives the plaintiff of ground legally won. *Lisbon v. Lyman*, 49 N. H. 553. As the statute in question did not forbid partial retrials, the common law rule should have prevailed, and such has been the holding in other jurisdictions having similar statutes. *San Diego Co. v. Neale*, 78 Cal. 63.

NUISANCE — EQUITABLE RELIEF — BILL AGAINST PUBLIC NUISANCE BY INDIVIDUAL. — The defendant, a riparian owner on New York Bay, erected a pier. This was so constructed as to hinder the free access of the public, by way of the sea-shore, to the plaintiff's place of amusement. The plaintiff sought to enjoin this obstruction, showing that it caused him special damage. *Held*, that the injunction should be granted. *Barnes v. Midland Railroad Terminal Co.*, 193 N. Y. 378.

This decision overrules that of the lower court discussed in 22 HARV. L. REV. 137.

PARDON — VALIDITY OF CONDITION EXTENDING BEYOND TERM OF SENTENCE. — A convict was pardoned on condition that if he subsequently committed a felony, the pardon should be void, and he should serve, in addition to the penalty imposed for the subsequent offense, that part of the original sentence which remained unserved at the time of his discharge. After the term of his original sentence had expired, he was convicted of a felony and sentenced to prison. After the expiration of the subsequent sentence, he was detained by reason of the condition in the pardon. *Held*, that the detention is lawful. *Ex parte Kelley*, 99 Pac. 368 (Cal.).

The rule that the power to grant a pardon carries with it the power of granting a conditional pardon is clearly settled. *Arthur v. Craig*, 48 Ia. 264. But the condition, of course, must not be illegal. See *State v. Smith*, 1 Bailey (S. C.) 283. The general rule is that a convict recommitted after condition broken may be detained after the time fixed for the expiration of his original sentence until he has served the unserved portion of that sentence. *In re McKenna*, 79 Vt. 34. A statute to the same effect has been held constitutional. *Fuller v. State*, 122 Ala. 32. On the other hand, it has been laid down that conditions which are to extend beyond the term of the sentence are illegal, as a usurpation of the judicial function by the executive. *In re Prout*, 12 Idaho 494. And it has been held that the duration of the condition will be limited to the period of sentence, unless the contrary is clearly stated. *Huff v. Dyer*, 4 Oh. Cir. Ct. R. 595. But of the few decisions on the point the majority support the principal case, and that, it would seem, with sound policy. *State v. Barnes*, 32 S. C. 14.

PLEDGES — RIGHTS OF PLEDGEE OF MORTGAGE WHO BUYS IN TITLE AT FORECLOSURE SALE. — The defendant gave the plaintiff his note, and assigned

to him as collateral security a mortgage on real property. The plaintiff foreclosed under a power of sale in the mortgage, and bought in the title. *Held*, that the plaintiff holds the title as trustee for the defendant, and subject to redemption on the defendant's payment of his debt. *Union Trust Co. v. Hasseltine*, 39 Banker and Tradesman 197 (Mass., Sup. Jud. Ct., Jan. 5, 1909).

It is the almost universal rule that a pledgee is precluded from buying at a sale of the property pledged. *Lord v. Hartford*, 175 Mass. 320. But he may take any proper action for its preservation. Accordingly, when the thing pledged is a mortgage he may foreclose the mortgage for breach of condition, and such foreclosure is valid against the mortgagee. *Smith v. Bunting*, 86 Pa. St. 116. And if the mortgagee, who is also the pledgor, is joined in the foreclosure sale, his right to redeem from the pledgee will likewise be extinguished. *Bloomer v. Sturges*, 58 N. Y. 168. On the same principle the pledgee may, with the pledgor's express authority, buy in the property at the mortgage sale with the result that the mortgagee's claim is transferred to the proceeds. *Jennings v. Wyzanski*, 188 Mass. 285. But with these qualifications the weight of authority supports the principal case, holding that the only effect of the sale is the substitution of the land for the mortgage in the hands of the assignee, who takes the legal title subject to a trust in favor of the pledgor. *Re Gilbert*, 104 N. Y. 200; *Montague v. Boston & Albany R. Co.*, 124 Mass. 242. *Contra*, *Anderson v. Messinger*, 146 Fed. 929.

POLICE POWER — NATURE AND EXTENT — COMPENSATION FOR DESTRUCTION OF PRIVATE PROPERTY. — During the war with Spain the commanding general of the United States army caused to be destroyed certain buildings in Cuba belonging to the plaintiff, a Pennsylvania corporation, in order to prevent the spread of yellow fever among the United States troops. The plaintiff brought suit in the Court of Claims for compensation. *Held*, that the plaintiff is not entitled to recover. *Juragua Iron Co. v. United States*, 212 U. S. 297.

If in time of peace private property is taken for public purposes without formal proceedings of condemnation, the owner may sue in the Court of Claims for compensation. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645. The action is quasi-contractual in its nature, and the Court of Claims has jurisdiction over actions of quasi-contract. *Ingram v. United States*, 32 Ct. Cl. 147. But when such property is found in enemy territory it may be seized and confiscated without compensation, even though it belongs to a loyal citizen of the confiscating government. *The Venus*, 8 Cranch (U. S.) 253. The principal case may also be justified on the ground that the property was not taken for public use, but was destroyed because detrimental to the public welfare. If private property is taken for public use, it is by an exercise of the power of eminent domain, and just compensation must be given according to the Fifth Amendment. But if private property is destroyed in the due exercise of the police power, no right to compensation arises. *Bowditch v. Boston*, 101 U. S. 16. See 3 HARV. L. REV. 189.

PUBLIC OFFICERS — DE FACTO OFFICERS — VALIDITY OF CONTRACTS. — A, while ineligible through the holding of another office, was regularly appointed and publicly recognized as school trustee. He and another trustee who together constituted a majority of the board voted in the regular way to accept a contract of employment with B as a teacher. The succeeding board composed of legally qualified and appointed members employed C for the same position. *Held*, that B is entitled to the position. *Johnson v. Sanders*, 115 S. W. 772 (Ky.).

An officer *de facto* is one who has the reputation of being the officer he assumes to be and yet is not an officer in point of law. *King v. Corporation of Bedford Level*, 6 East 356; *State v. Carroll*, 38 Conn. 449. Such officer must hold under color of right, either through election or appointment, or through long-continued acquiescence by the public in his exercise of the office. *State v. Carroll*, *supra*. Thus one ineligible on account of occupancy of an incompatible office has been held a *de facto* officer. *McGregor v. Balch*, 14 Vt. 428.

The authorities are divided as to whether there can be a *de facto* officer when there is no *de jure* office. *Norton v. Shelby County*, 118 U. S. 425. *Contra, Lang v. Bayonne*, 74 N. J. L. 455. Necessity demands that the public be protected in its dealings with public officers. See *Plymouth v. Painter*, 17 Conn. 585. Hence it is settled that the acts of a *de facto* officer within the scope of his apparent authority are valid so far as the rights of the public and interested third persons are concerned. *Wilcox v. Smith*, 5 Wend. (N. Y.) 231. These acts cannot be attacked collaterally. *Plymouth v. Painter, supra*. Thus contracts made by officers *de facto* are binding. *School Town of Milford v. Zeigler*, 1 Ind. App. 138. But there would be no reason for the application of this rule if the defect in title were notorious. *Conway v. City of St. Louis*, 9 Mo. App. 488.

QUIETING TITLE—CANCELLATION OF UNENFORCEABLE COVENANT.—By mesne conveyances the plaintiff acquired from the defendant a lot of land, the deed of which contained a covenant not to use the land for any but church purposes. The land had not been sold for a smaller price by reason of the covenant, and the covenant was of no value to the defendant, who was simply using it as a means of extortion. The plaintiff, claiming that the covenant was invalid and prevented a favorable mortgage of the property, filed a bill praying that the defendant be ordered to release it. *Held*, that the covenant is unenforceable and that the defendant be ordered to release it. *Rector, etc., of St. Stephens Church v. Rector, etc., of the Church of the Transfiguration*, 40 N. Y. L. J. 1940 (N. Y., App. Div., Jan. 1909).

The case is a novel one and the decision sane. It is especially noteworthy because of the long-continued tendency of the New York courts to limit within narrow bounds the jurisdiction of equity in this class of cases. Thus its courts will not entertain bills for the cancellation or restoration of paid notes, or of instruments obtained by fraud. *Fowler v. Palmer*, 62 N. Y. 533; *Globe Co. v. Reals*, 79 N. Y. 202. And it has long been the established New York rule that in a bill to remove a cloud on title the plaintiff must fail if the claim of the defendant is invalid on its face, or if its invalidity must inevitably be disclosed in its enforcement. *Scott v. Onderdonk*, 14 N. Y. 9. See 18 HARV. L. REV. 527; 2 AMES, CAS. EQ. JUR., 148, 150. This narrow and pedantic rule the court in the present case refuses to recognize on the authority of very early cases of the cancellation of instruments, although it grants that the covenant was invalid on its face, or would necessarily appear so in any attempt to enforce it. The result is refreshing, and it is to be hoped that it marks a tendency of the New York equity courts to get away from unnecessary technicalities and broaden their jurisdiction.

RULE AGAINST PERPETUITIES—REMOTENESS OF VESTING AS THE TEST IN NEW YORK.—A testator bequeathed personal property to his executors in trust to pay the income to W. for life, with the further direction: "and at her decease I give to her issue, share and share alike, such income, and as each of her said issue shall attain the age of 21 years, I give to it one equal undivided share of the principal"; and in case W. should die, leaving no issue which should attain 21 years, then the fund was to go to S. and M., persons then living. *Held*, that the gift to S. and M. is void for remoteness under the New York Revised Statutes. *Matter of Wilcox*, 194 N. Y. 288. See NOTES, p. 520.

VENDOR AND PURCHASER—RIGHTS AND LIABILITIES—CONDITIONS PRECEDENT TO FORFEITURE OF PAYMENTS ON DEFAULT.—The defendant agreed to convey certain land to the plaintiff as soon as he got title. Payment was to be by installments, all payments to be forfeited on a default. There was default in the last installments; but the defendant did not declare a forfeiture until after he had acquired title, nor did he ever tender a deed. The plaintiff sought specific performance. *Held*, that the plaintiff is entitled to

relief; for after the defendant has acquired title he cannot enforce a forfeiture without having tendered a deed. *Tacoma Water Supply Co. v. Dumermuth*, 99 Pac. 741 (Wash.).

A vendor may either enforce or waive a forfeiture clause; but if he wishes to enforce it he must give notice of that intention. *Chrisman v. Miller*, 21 Ill. 227, 236; *Harris v. Troup*, 8 Paige (N. Y.) 422. If forfeiture is not declared until performance of the vendor's promise is due, the promises become mutual and concurrent. *Beecher v. Conradt*, 3 Kern. (N. Y.) 108. Thereafter the vendor cannot declare a forfeiture without first tendering a deed. *Stein v. Waddell*, 37 Wash. 634. Hence in the principal case the defendant never made a valid declaration of forfeiture. Even if he had, it is not certain that he could avoid specific performance. For the forfeiture clause alone does not make time of the essence. *Barnard v. Lee*, 97 Mass. 92. And even though the parties stipulate that time shall be of the essence, equity may refuse to allow a forfeiture. *National Land Co. v. Perry*, 23 Kan. 140; *Richmond v. Robinson*, 12 Mich. 193. In England and in some American jurisdictions, if the delay does not put the parties in such a position that damages will not be an adequate compensation, equity will give specific performance, despite the forfeiture clause. *In re Dagenham Co.*, 8 Ch. App. 1022; *Edgerton v. Peckham*, 11 Paige (N. Y.) 352.

VENDOR AND PURCHASER — SPECIFIC PERFORMANCE — MARKETABLE TITLE. — The plaintiff sued to recover an installment paid under a contract for the purchase of land, on the ground that the defendant could not furnish a marketable title. The defendant denied that his title was unmarketable, and asked specific performance. The determination of the validity of the title would involve a decision upon a doubtful point of law. *Held*, that the plaintiff will not be compelled to take a conveyance from the defendant. *Dixon v. Cosine*, 114 N. Y. Supp. 615. See NOTES, p. 529.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES — POLLUTION BY MINING OPERATIONS. — The plaintiff, a lower riparian owner, was damaged by the pollution of the stream by salt water caused to flow into it by the defendant, in mining petroleum. The defendant's operations were conducted with due care in the only known method, and the discharge of salt water into the stream was inevitable. *Held*, that the plaintiff may recover damages. *Straight v. Hover*, 54 Oh. L. Bull. Supp. 78 (Oh. Sup. Ct., Jan. 26, 1909).

The rule that an upper riparian owner is liable to a lower owner for any injury from pollution of the stream caused by an unreasonable user has been generally recognized. *Ferguson v. Firmenich Manufacturing Co.*, 77 Ia. 576. The reasonableness of the user is a question for the jury upon all the circumstances of the case. *Hayes v. Waldron*, 44 N. H. 580. Thus where the owner of cattle pastured them near a stream, and they so befouled the water that it was unfit for use by a water company, it was held that the owner was not liable. *Helfrich v. Catonsville Water Co.*, 74 Md. 269. But a user for manufacturing purposes is generally considered unreasonable. See *Strobel v. Kerr Salt Co.*, 164 N. Y. 303. And it is no defense that the pollution was unavoidable. *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. D. 769. But the rule has been laid down that where a work is lawful and cannot be carried on elsewhere, there is no liability in the absence of negligence. *Barnard v. Sherley*, 135 Ind. 547. And it has been held that the protection of important industries renders the general rule of liability inapplicable. *Pa. Coal Co. v. Sanderson*, 113 Pa. St. 126. But the weight of authority supports the principal case. *Bowling Coal Co. v. Ruffner*, 100 S. W. 116 (Tenn.). And in most jurisdictions the plaintiff might also have obtained an injunction. *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65. See 14 HARV. L. REV. 458; 18 *ibid.* 149. *Contra*, *Salem Iron Co. v. Hyland*, 74 Oh. St. 160.

BOOK REVIEWS.

INDEX ANALYSIS OF THE FEDERAL STATUTES. By George Winfield Scott and Middleton G. Beaman. Vol. I. (1873-1907). Washington: Government Printing Office. 1908. pp. v, 1373. 8vo. (\$2.50.)

Here is an index made with such care and intelligence that the authors are entitled to unusually hearty thanks.

The chief purpose of this volume is to furnish a key to the general and permanent law — whether now in force or not — found in the United States Revised Statutes of 1873 and in the subsequent volumes of the Statutes at Large, closing with volume 34.

As much law of a general and permanent nature is concealed in enactments apparently personal, local, or temporary, the task of the authors has been even more difficult than would be expected from the mere statement that the statutes examined cover 40,000 pages; and consequently unusual care has been taken, the work of previous compilers being discarded and the statutes being examined anew by several investigators working independently and eventually checking one another's results.

The alphabetical classification follows a plan which includes numerous headings, sub-headings, and cross references. The excellence of the arrangement can be seen by looking at almost any heading, *e. g.*, Eminent Domain, Interstate Commerce, Labor. The reader's convenience is consulted further by inserting in more than twenty places two pages entitled "How to use the index"; and his confidence in the volume is, to say the least, not diminished by printing on each leaf the request "Please report to the authors any error or omission discovered."

The index does not ignore the unofficial names by which statutes are popularly designated. In the proper alphabetical place one finds, for example, the Commodity Clause of the Railroad Rate Act, the Elkins Act (Interstate Commerce), the Platt Amendment (Cuba), and the Sherman Act (Trusts). At the end of the volume is a special index of the popular names of statutes from 1789 to the present time. This is a feature of interest both to the lawyer and to the student of history, as is shown by finding here such famous titles as Alien Enemies Act, Civil Rights Acts, Emancipation Proclamation, Embargo Acts, Fugitive Slave Law, Legal Tender Acts, Morrill Act, Sedition Act, Tenure of Office Act, Union Pacific Railroad Charter, and Wilmot Proviso — each being followed, of course, with the reference to the Statutes at Large.

From the point of view of the authors, probably the most important feature of this volume is its relation to a general scheme intended to aid Congressmen and others to frame prospective statutes with full knowledge of previous enactments. Other volumes may be expected to deal with statutes prior to the Revised Statutes of 1873, local laws, treaties, and other matter. Perhaps — for such is the dream of the authors — there may even arise eventually a group of official draftsmen — experts in framing and phrasing statutes. Meanwhile there is no question that the present conscientious volume is to be of great assistance to legislators, lawyers, and historians.

CASES ON THE LAW OF PARTNERSHIP. Selected by Eugene Allen Gilmore. St. Paul: West Publishing Company. 1908. pp. xvi, 638. 8vo.

A case book must be judged by different standards from a text book. In a text book the important thing is what the author says. In a case book the worth of the work depends primarily on what the author has selected. Such a book cannot be fairly criticized in respect of substance without careful analysis of the material from which it is drawn — a task impossible to the reviewer. In

regard to the present work the reviewer can simply say that to him the cases selected seem cogent and illustrative.

In arrangement the book is clear and logical. Perhaps the chapter on partnership property — always a complicated subject because of the divergence between the lay and the legal conception of a partnership — is somewhat compact and might have been clearer if divided into two or three chapters. Yet the limited time which is at the disposal of a class may have compelled the author to compress as he has. The book contains a good index, table of cases, and table of contents, which make it of value to one in search of illustrative cases. On the other hand, it lacks one feature which would add greatly to its value, namely, full footnotes containing cases *contra* and in accord with the case in the text. Such notes make the case book a special digest to which the student may later refer as a practitioner, and thus frequently save himself hours of labor. The preparation of a case book necessarily involves examination of many decisions. To a few cases the author has added scanty notes. Had he placed the results of his necessary labor completely at the disposal of the student he would have added a very valuable feature to a good book.

E. H. A., JR.

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- PROCEDURE IN INTERSTATE COMMERCE CASES. By John B. Daish. Washington: W. H. Lowdermilk and Company. 1909. pp. xiv, 494.
- CASES ON THE CONFLICT OF LAWS. By Ernest G. Lounger. American Case Book Series. James Brown Scott, General Editor. St. Paul: West Publishing Company. 1909. pp. xxi, 784. 8vo.
- THE GOVERNMENT OF EUROPEAN CITIES. By William Bennett Munro. New York: The Macmillan Company. 1909. pp. viii, 409. 8vo.
- CASES ON CRIMINAL LAW. By William E. Mikell. American Case Book Series. James Brown Scott, General Editor. St. Paul: West Publishing Company. 1909. pp. xvii, 610. 8vo.

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THE EFFECT OF A NATIONAL BANKRUPTCY LAW UPON STATE LAWS.

FOUR National Bankruptcy Acts have been passed since the adoption of the Constitution under the authority given to Congress in that instrument "to establish . . . uniform laws on the subject of bankruptcies throughout the United States."¹ But it is still to some degree uncertain what the effect of such national laws is upon the powers of the several states. It is clearly established that when no national act is in force, states have full power to pass bankruptcy laws.² The only limitation at such a time on the power of the states is the constitutional prohibition against impairing the obligation of contracts. Owing to this prohibition, even though no national law is in force, a state cannot by a bankruptcy or insolvency law discharge a debt arising either under a contract entered into before the discharge of the state law in question or under a contract made without the state.³

But the powers of the states when Congress has passed a bankruptcy law are by no means so clear. It is indeed agreed that the federal law is paramount, and that the states must yield to its authority if collision arises;⁴ and that state laws in so far as they conflict with a national bankruptcy law are not thereby destroyed,

¹ Art. I, § 8.

² *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122.

³ This matter was elaborately discussed in *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, and the law is now settled with very little difference of authority. See 6 HARV. L. REV. 349.

⁴ *In re Watts*, 190 U. S. 1.

but at most merely suspended during the existence of the federal statute.¹ But beyond this there is the greatest difference of opinion. If a state has in force a bankruptcy law at the time a national act is passed, even though the state law is similar in some or all of its provisions to the national act, the view is taken by some authorities that the state law remains in force and proceedings may be had under it so long as bankruptcy proceedings are not actually begun under the federal law.² This is certainly an inconvenient doctrine, for, as the federal court confessedly may demand the property of a bankrupt from the state court when proceedings have been begun under the national act, there can be no certainty of result in any proceedings begun in the state court. Such proceedings are liable to be terminated at any stage by an adjudication against the bankrupt in the federal court. Extended consideration of the point is unnecessary, for the cases just referred to are so distinctly opposed, not only to the weight of authority in state courts, but to the views expressed by the Supreme Court of the United States, that it must now be generally admitted that the state law is wholly suspended so far as it covers the same ground as the national act.³ But though many states have on their

¹ *Tua v. Carriere*, 117 U. S. 201; *Butler v. Goreley*, 146 U. S. 303; *Lothrop v. Highland Foundry Co.*, 128 Mass. 120. So a state law on the subject of bankruptcy passed while a federal statute is in force goes into effect automatically on the repeal of the latter law. *Palmer v. Hixon*, 74 Me. 447.

² *Re Scholtz*, 106 Fed. 834 (D. C. Ia.); *Maltbie v. Hotchkiss*, 38 Conn. 80, 83; *Reed v. Taylor*, 32 Ia. 209; *Ex parte Ziegenfuss*, 2 Ired. (N. C.) 463.

³ This view was expressed by the Supreme Court in *Tua v. Carriere*, 117 U. S. 201, 209, 210. In speaking of the effect of the federal bankruptcy law on the insolvent law of Louisiana (which was in reality a bankrupt law), the Court said: "The effect of the Bankrupt Act would have been to suspend it only while the Bankrupt Act remained in force, and on its repeal the Insolvent Law would have revived. *Ward v. Proctor*, 7 Met. (Mass.) 318; *Lothrop v. Highland Foundry Co.*, 128 Mass. 120; *Orr v. Lisso*, 33 La. Ann. 476. . . . If those laws [Louisiana insolvent laws] had been enacted for the first time, they would, so far as inconsistent with the Bankrupt Act, have been inoperative while that act remained in force, but upon its repeal would have come into operation." The reasoning of the Supreme Court in *Mayer v. Hellman*, 91 U. S. 496, and *Boese v. King*, 108 U. S. 379, is also based on a similar assumption. Neither of these decisions directly involved the question; for in each case there had been an adjudication in bankruptcy, and the point at issue was whether state laws under which assignments by the debtors had been made previously were bankrupt laws, and as such suspended by the national act. That the state laws were suspended if they were bankrupt laws is clearly assumed. To the same effect are *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A. 1; *Re Storck Lumber Co.*, 114 Fed. 360; *Re F. A. Hall*, 121 Fed. 992; *Ex parte Eames*, 2 Story (U. S.) 322; *Com. v. O'Hara*, 1 N. B. R. 87; *Thornhill v. Bank*, 3 N. B. R. 435, 5 N. B. R. 367; *Ketcham v. McNamara*, 72 Conn. 709; *Harbaugh v. Costello*, 184 Ill. 110; *Beach v. Miller's*

statute books laws dealing with the subject of bankruptcy, it would be hard to find two states whose laws are identical with one another, and no state has a law identical with the national act. Some states have enforced, during the periods when there has been no federal statute on the subject, systematic bankruptcy laws, varying in detail, but providing for involuntary as well as voluntary distribution of a debtor's property and for the debtor's discharge from all provable debts, though such state laws have not generally been called bankruptcy laws. These states are California, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, North Dakota, Rhode Island. In other states more or less partial systems have prevailed, and the chiefly disputed question is this: are these state bankruptcy laws, complete or partial, suspended altogether on the passage of a federal bankruptcy law, or are such parts of them still in force as relate to persons or matters not covered by the national law? The latter answer seems to have been suggested by Chief Justice Marshall.¹ And support for it is to be found in state decisions relating both to earlier national bankruptcy laws and also to that now in force. While the national law of 1867 was in force, it was held by the Supreme Court of Connecticut that as that act applied only to cases where the debtor owed provable debts exceeding the amount of \$300, the state insolvent law which contained no such limitation remained in force as to debtors owing amounts insufficient to give the federal court jurisdiction.²

Exrs., 15 La. Ann. 601; *Duffy v. His Creditors*, 48 So. 120 (La.); *Moody v. Port Clyde Development Co.*, 102 Me. 365; *Van Nostrand v. Carr*, 30 Md. 128; *Griswold v. Pratt*, 9 Met. (Mass.) 16; *Lyman v. Bond*, 130 Mass. 291; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; *Rowe v. Page*, 54 N. H. 190; *E. C. Wescott Co. v. Berry*, 69 N. H. 505; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324.

¹ *Stuges v. Crowninshield*, 4 Wheat. (U. S.) 122, 195. "It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach." Marshall adds: "Be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."

² *Shepardson's Appeal*, 36 Conn. 23. In *Geery's Appeal*, 43 Conn. 289, the court sustained involuntary proceedings under the state insolvent law against a corporation, it not appearing that the corporation had committed an act of bankruptcy under the

Similarly, since the present national act has been in force, the Court of Appeals of Maryland has held that the state law is still operative as to farmers, since they are excepted from involuntary bankruptcy under the national law.¹ And wage-earners and farmers have likewise been held by the Pennsylvania Superior Court to be subject to proceedings under the state insolvency law, though that law has been suspended as to other persons.² The Supreme Court of California, following the same line of reasoning, prior to 1903 held the local law applicable to mining corporations which, until the amendment of that year, were excluded from the operation of the federal law;³ and has also held that corporations of all kinds may begin voluntary proceedings under the state law, since they are not permitted to do so under the national act.⁴ It is easy to imagine other applications of the same doctrine. If these decisions are sound, all persons not subject to bankruptcy proceedings under the National Act may be made subject to state laws; all persons excluded from voluntary proceedings may be allowed to institute them in state courts; all persons excluded from involuntary bankruptcy may be subjected to it by the states; the states may establish for all classes of persons any other acts of bankruptcy in addition to those enumerated in the national act, and such additional acts of bankruptcy may be made the basis of adjudication and administration in the state courts; for as to all these matters the federal act is silent, neither providing for federal proceedings nor in express terms forbidding state action.

national act, nor that a sufficient number of creditors wished to institute proceedings in bankruptcy. The court say (p. 298): "So far as that act assumes and takes jurisdiction of the parties and of the subject matter, just so far is the jurisdiction of the state court excluded. On the other hand, we contend that in respect to all persons and matters over which the bankrupt act declines to take jurisdiction, the statute of this state remains in full force." But this doctrine was held, if sound under the act of 1867, not sound under the act of 1898 in *Ketcham v. McNamara*, 72 Conn. 709. In that case an assignment under the state law was held to give the assignee not even a voidable title, though no bankruptcy proceedings had been begun.

In the early case of *Clarke v. Ray*, 1 H. & J. 318, 320, it was said: "The legislatures of the several states have competent authority to pass laws for the relief of all persons who are not comprehended within the act of Congress." See also *Simpson v. City Savings Bank*, 56 N. H. 466; *Carter v. Sibley*, 4 Met. (Mass.) 298, per Shaw, C. J.; *Tobin v. Trump*, 7 Phil. 123.

¹ *Old Town Bank v. McCormick*, 96 Md. 341.

² *Re Rittenhouse's Insolvent Estate*, 20 Pa. Super. Ct. 468; *Citizens' Nat. Bank v. Gass*, 29 Pa. Super. Ct. 125; *Miller v. Jackson*, 34 Pa. Super. Ct. 31.

³ *R. H. Herron Co. v. Superior Court*, 136 Cal. 279.

⁴ *Keystone Driller Co. v. Superior Court*, 138 Cal. 738.

On the other hand, in Massachusetts, the state insolvency courts are altogether closed, and no proceedings under the state law would be entertained against any one for any cause, the theory established in Massachusetts being that the national system has altogether superseded the state system.¹ The same rule has been applied in Illinois² and Maine.³

It is submitted that this doctrine is correct and that all state laws which can properly be called bankruptcy laws are altogether suspended.

It need not be contended that Congress has not the power to pass a bankruptcy law confessedly partial, and that if Congress does this, the states may enact laws to cover the remainder of the ground. It is enough to assert that Congress has manifested an intent to deal with the whole subject of what is commonly called bankruptcy legislation. Any argument on this point must take into consideration the extent of the grant of power to Congress in the Constitution; that is, a meaning must be given to the words used in the Constitution, — "The subject of bankruptcies." The Constitution was written and adopted with the English system in mind, and it might be urged forcibly, and indeed it has been contended, that Congress was limited in its power over bankruptcy legislation to laws analogous to the English bankruptcy laws in force at the end of the eighteenth century. The English law at that time was confined in its operation to traders, and provision was made for involuntary bankruptcy only. But it is to be observed that the English bankruptcy law had not uniformly preserved the same boundaries. Prior to the reign of Queen Anne, discharges in bankruptcy were unknown, and were first allowed by statutes passed for a brief term of years as a temporary expedient. Other less striking but still important changes had from time to time been made. The framers

¹ *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178.

² *Harbaugh v. Costello*, 184 Ill. 110. The Illinois voluntary assignment law was held to be wholly superseded and suspended by the national act.

³ *Moody v. Port Clyde Development Co.*, 102 Me. 365, 383. "The proposition might be plausibly suggested that a corporation which cannot become a voluntary bankrupt should be permitted to take advantage of a state law giving it authority of its own motion, to wind up its affairs, by dissolution, collection of debts, and distribution of assets. But the proposition is not tenable." It seems probable that the Supreme Court of Connecticut would take the same position if compelled to decide the question. In *Ketcham v. McNamara*, 72 Conn. 709, an assignment under the state law was held void, but the assignor was one who had committed an act of bankruptcy for which he could have been adjudged a bankrupt, and therefore his case was clearly covered by the national act.

of the Constitution might reasonably expect that the English bankruptcy system in force in 1787 would be no more final than its predecessors had been. Such an expectation certainly would have been realized. Modern English bankruptcy law, like modern American bankruptcy law, includes within its scope voluntary proceedings, and is applicable to other classes of the community besides traders. The English law of today has indeed in some particulars been extended farther than the American law: notably, the estates of deceased insolvents may be settled in the bankruptcy courts in England. The uniform conclusion of American courts that the bankruptcy acts passed by Congress were constitutional, therefore, seems sound; though the Act of 1841 and the subsequent acts have contained a system of voluntary bankruptcy and have been applicable to classes of the community other than traders.¹

It is not to be supposed that the present bankruptcy law or its predecessors fully exhaust the power of Congress. Marshall said, "A bankruptcy law may contain those regulations which are generally found in insolvent laws," and it has even been suggested that Congress may "establish uniform laws, on the subject of any person's general inability to pay his debts, throughout the United States."² If this be true, Congress has power to take altogether

¹ In *Adams v. Storey*, 1 Paine C. C. 79, 82, Judge Livingston of the United States Supreme Court said: "So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an Act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject." After the passage of the Act of 1841 it was held to be unconstitutional by Judge Wells of the United States District Court for the District of Missouri in *Re Klein*, 2 N. Y. Leg. Obs. 185, and an elaborate dissenting dictum to the same effect was pronounced by Judge Bronson in *Sackett v. Andross*, 5 Hill (N. Y.) 327; but the decision of the District Court in *Re Klein* was reversed in the Circuit Court by Judge Catron of the U. S. Supreme Court, 1 How. (U. S.) 277, note. The question was not raised in the United States Supreme Court, because under the Act of 1841 no bankruptcy cases could come before that court for review. *Nelson v. Carland*, 1 How. (U. S.) 265.

But many decisions in other courts sustained the validity of the Act. *State Bank v. Wilborn & Phillips*, 6 Ark. 35; *Lalor v. Wattles*, 8 Ill. 225; *Hastings v. Fowler*, 2 Ind. 216; *Loud v. Pierce*, 25 Me. 233; *Thompson v. Alger*, 12 Met. (Mass.) 428; *Reed v. Vaughan*, 15 Mo. 137; *Kittredge v. Warren*, 14 N. H. 509; *Cutter v. Folsom*, 17 N. H. 139; *Kunzler v. Kohaus*, 5 Hill (N. Y.) 317; *McCormick v. Pickering*, 4 N. Y. 276.

The Act of 1867, as a whole, was uniformly held constitutional. *Re Silverman*, 4 N. B. R. 522; *Re Reynolds*, 9 N. B. R. 50; *Re Reiman*, 11 N. B. R. 21; *Re California Pacific R. Co.*, 11 N. B. R. 193. The constitutionality of the Act of 1898 has been conclusively settled by *Hanover National Bank v. Moyses*, 186 U. S. 181.

² *Kunzler v. Kohaus*, 5 Hill (N. Y.) 317, 321.

into the federal courts all matters covered by laws for the release of poor debtors, and for the distribution of insolvent estates of insane persons and deceased persons as well as all matters now commonly disposed of by receivers of insolvent corporations; but, though Congress may have the power to bring such matters within a bankruptcy law and thereby exclude the local law from further operation upon them, though they have for centuries been habitually disposed of outside of bankruptcy laws and courts, the intent to do this is not to be presumed. The term "bankruptcy laws" does not have now the identical meaning which it formerly had, and after another century will very probably not have the precise meaning it now has. The constitutional grant of power may be wide enough or elastic enough to accommodate itself to these changed meanings. But at any given time when Congress passes elaborate bankruptcy legislation the natural assumption is that Congress intended to deal with the whole subject at that time commonly regarded as belonging within the limits of a bankruptcy law, and the burden should clearly be thrown on one who asserts that Congress meant to cover either a more extensive or a narrower field.

If these principles are applied to the present situation, the Act of 1898, like the Act of 1867, and perhaps still more clearly, seems on a proper construction to manifest a purpose to deal with the whole subject of bankruptcy, up to the boundary that modern law fixes between bankruptcy legislation (whether state or federal) and other branches of the law. Any cases properly within that subject which are not covered by the act are omitted, because it seemed wise to Congress that in such cases bankruptcy proceedings should not be permitted, not because the power of passing appropriate legislation in regard to them was relegated to the several states. This is indicated by the nature of the exceptions from the operation of the act. Wage-earners and farmers were obviously excluded from involuntary bankruptcy because wage-earners belong to a class habitually favored in legislation on account of their limited means; and farmers were excluded presumably because they do not actively engage in trade, and because to deprive them of their farms would also deprive them of their means of subsistence. Corporations were excluded from voluntary bankruptcy because voluntary proceedings are intended for the relief of the bankrupt and to enable him to start afresh. Such relief while appropriate to an individual debtor is not appropriate

to corporations. Especially is this true when, as under the present act, corporations are allowed discharge in bankruptcy.¹

The corporations which are excluded from involuntary bankruptcy are not trading corporations, and bankruptcy proceedings are generally not the best way of dealing with insolvent corporations of other classes. Bankruptcy necessarily involves a quick winding up of the affairs of the bankrupt. In the case of many corporations which are not engaged in trading, such hasty proceedings will be injurious not only to those directly interested in the corporations but to the public as well. An insolvent railroad corporation or insurance corporation may require a very different kind of procedure in order to produce the best results.

The difficulty of conceding to the state law operation on the persons excluded from the national law is further shown by the circumstances that the individual persons excluded from involuntary bankruptcy, either because of the nature of their business or because of insufficiency of indebtedness, are not excluded from voluntary proceedings; and, on the other hand, the corporations which are excluded from voluntary bankruptcy may, in many cases, be subject to involuntary proceedings. Had it not been decided by respectable courts, it would seem an astonishing contention that Congress when it allowed wage-earners and farmers the right to become voluntary bankrupts, but denied creditors the right to bring involuntary petition against them, intended to permit the states to enact legislation authorizing them to be made involuntary bankrupts. If involuntary proceedings were to be permitted at all against such persons, it is incredible that the federal bankruptcy court should not have been given jurisdiction over the matter. An unseemly conflict of authority is otherwise directly invited; for if an involuntary petition is allowed in a state court against a farmer, he may file a voluntary petition in the federal court, and the admitted supremacy of the bankruptcy law involves the conclusion that the state court must at once surrender the assets. Such a situation is inevitable in some cases, but surely Congress could not have intended directly to invite it.

If persons excluded from the operation of the national act by its terms are to be subject to state insolvency proceedings, it would seem equally true that acts of bankruptcy not included as ground for bankruptcy proceedings in the federal act might be made the

¹ *Re* Marshall Paper Company, 102 Fed. 872.

basis for similar proceedings under state laws. It might just as well be argued that Congress has left to the states power to deal with all other acts of bankruptcy beside those mentioned in the statute, as to say that Congress has left to the states power to deal with persons and corporations which are not subject to federal bankruptcy proceedings.

The closing sentence of the Bankruptcy Act also lends force to the argument that Congress intended to supersede all state legislation on the subject of bankruptcy. That sentence provides that "proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it."¹ An almost necessary inference from this sentence is that proceedings commenced under state insolvency laws after the passage of this act shall be superseded by it. The sentence in the act is without qualification, and warrants an equally unqualified inference that all subsequent proceedings against any persons, whether within the scope of the federal act or not, are no longer to be subject to state insolvency proceedings.² Finally, if the question is to be regarded as doubtful whether the states still retain power over persons and corporations excluded from the operation of the federal act, the doubt should be resolved if possible in favor of the national law and against a continued validity of the state laws. The purpose of the Constitution in conferring powers to pass bankruptcy laws upon Congress was, as the Constitution itself shows, that such laws might be uniform throughout the United States. A system can hardly be considered uniform when in some states a wage-earner or farmer is subject to involuntary bankruptcy while in other states he is not. Though the national law itself may still be uniform and the words of the Constitution thus be literally observed, their real intent is violated, for the intent can be nothing less than to give Congress the power to establish a system of bankruptcy which shall be uniform throughout the country; and whenever Congress passes a bankruptcy law it is to be assumed that the purpose of the law is to create a system uniform throughout the whole country.

Whether it be held that a federal bankruptcy law totally suspends all state bankruptcy laws, or suspends them only so far as they apply to the same persons, for the same causes, another question still

¹ Sec. 71 (b).

² This reasoning is that of the court in *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178.

remains: What state laws are to be regarded as included under the general designation of bankruptcy laws, and therefore are suspended altogether, if the view here contended for is sound; or are at least partially suspended, if the view upheld by the courts of California and Maryland is to be accepted? If all laws which concern the distribution of an insolvent debtor's property among his creditors be properly classed as bankruptcy laws, then state statutes which regulate the distribution of the insolvent estates of deceased persons, or which regulate the distribution of property under a general assignment for the benefit of creditors, or which provide for the relief of poor debtors from arrest, or for receiverships of insolvent corporations, must be suspended. But, as has been said, though the constitutional grant of power may possibly have this wide scope, it is not to be assumed, in the absence of clear language in a national act, that Congress intended to take to itself matters which had been generally dealt with under statutes not classed as bankruptcy laws or under common law rules. That national bankruptcy acts do not suspend all right on the part of the states to deal with insolvent estates has been settled by the Supreme Court of the United States.¹

In order to arrive at a just conclusion it is necessary to consider the extent of the powers granted by the Constitution to the national government, and to consider historically the scope of the early English bankruptcy laws, and the situation at the time when the Constitution was adopted.

The early bankruptcy laws were intended solely for the benefit of creditors, and a bankrupt was regarded as a quasi-criminal. No discharge was allowed until the reign of Queen Anne, and it need hardly be said that voluntary bankruptcy was unknown until after discharges were allowed. Even after the reign of Queen Anne, the discharge was looked upon rather as a reward given to the bankrupt to induce him to make full disclosure of his assets and aid his creditors in obtaining as large a dividend as possible, rather than as something to which the bankrupt was of right entitled, and itself an important object of the bankruptcy proceedings. Voluntary petitions were not authorized until the nineteenth century, although prior to their allowance friendly creditors would some-

¹ *Mayer v. Hellman*, 91 U. S. 496; *Boese v. King*, 108 U. S. 379. In these cases general assignments under state statutes were held effectual if no petition in bankruptcy was filed within six months, the period within which an act of bankruptcy had to be taken advantage of under the act of 1867.

times at the instance of the bankrupt file a petition against him in order that he might secure a discharge.

As the bankruptcy law was intended as an added remedy to enable creditors to collect their dues, it was only gradually that the English bankruptcy law limited creditors of a bankrupt debtor in pursuing also the remedies allowed by the common law. Moreover, as only traders were subject to bankruptcy, the partial relief against imprisonment for debt afforded to bankrupts protected only one class of the community. With the increase of humanitarian feeling at the beginning of the nineteenth century, laws were passed to enable debtors who had surrendered all their property to escape imprisonment. These laws were known as insolvent laws. Ultimately their substance was incorporated in the English Bankruptcy Law, and since 1861 they have been wholly merged in it. One of the great sources of confusion in dealing with the subject of state bankruptcy laws is the double use given to the words "insolvency" and "insolvent." According to the English usage an insolvency law is aimed to relieve a debtor from imprisonment for debt, while the primary aim of a bankruptcy law is the equal distribution of his property among his creditors. In the United States the English meaning of insolvency law or insolvent law may still prevail in some states.¹ But quite commonly an insolvent law or an insolvency law is used as a synonym for a state bankruptcy law. Perhaps because the federal Constitution gave Congress power to pass bankruptcy laws, it was thought best by state legislatures to give another name to their enactments, even though these enactments in fact were bankruptcy laws. As has already been said, a number of states have enforced, during the period when there has been no federal bankruptcy law, complete bankruptcy systems; but in no case has the name of bankruptcy law been applied to state legislation.²

In construing the Constitution it is desirable to bear in mind the meaning attached at the close of the eighteenth century to the word "bankruptcy." Doubtless the power of Congress was not intended to be confined and is not confined to the passage of

¹ Thus in New Jersey a law the primary purpose of which was to abolish imprisonment in certain cases is called an insolvency law. *Steelman v. Mattix*, 36 N. J. L. 344. A Pennsylvania statute having the same object was similarly designated. *Sullivan v. Hieskill, Crabbe* (U. S.) 525.

² Thus the closing sentence of the federal statute of 1898 which refers to "State insolvency laws" doubtless means state laws that are in fact bankruptcy laws rather than laws relieving poor debtors from imprisonment for debt.

bankruptcy laws identical with the English laws then in force, but a clearly marked distinction then existing between bankruptcy laws and insolvency laws cannot be disregarded. Even if it be assumed that Congress might pass a bankruptcy law superseding all state laws for the relief of poor debtors from imprisonment, it is not to be assumed that such is the effect of a federal statute unless it clearly expresses its purpose. In the absence of clear expression to the contrary, the assumption should rather be that Congress expected such state laws to exist side by side with a bankruptcy statute, as was the case in England until 1861, and as has long been the case in Massachusetts. It seems clear, therefore, that at the present time a law which is confined in its operation to relieving a debtor from arrest or imprisonment is not suspended by a federal bankruptcy law.¹ Even though it is made a condition of freeing the debtor from liability of arrest and imprisonment that he shall assign all his property, not to the creditor who is proceeding against him, so far as is necessary to pay the latter's claim, but for distribution among all his creditors ratably, thereby introducing into the statute an element which formerly was and still is an essential purpose of a bankruptcy law; still, since the main purpose, if not the only purpose, of the statute is to protect the debtor from imprisonment, and since the ratable distribution of the debtor's assets is required only as an equitable condition of freedom from arrest, it would seem that the statute continued in force after the passage of a national bankruptcy law.² This question is only material in the older states, for in the others imprisonment for debt is totally abolished.

For similar historical reasons state statutes conferring on probate courts the distribution of the insolvent estate of deceased persons and of insane persons are not superseded.³ The care and distribution of such estates has long been entrusted to probate courts, and unless Congress clearly manifests an intention to include such matters within the national system, the state laws will continue in force.

The most important question, however, relates to the effect of laws regulating general assignments for the benefit of creditors.

¹ *Stockwell v. Silloway*, 100 Mass. 287, 105 Mass. 517; *Steelman v. Mattix*, 36 N. J. L. 344; *Scully v. Kirkpatrick*, 79 Pa. 324; *Jordan v. Hall*, 9 R. I. 218.

² Such was the decision in *Steelman v. Mattix*, 36 N. J. L. 344. Cf. *In re Reynolds*, 8 R. I. 485.

³ *Hawkins v. Learned*, 54 N. H. 333.

The great majority of the states have never had any local bankruptcy system. Insolvent estates have been distributed, so far as they can be said to have been distributed at all, either under receiverships or more commonly under general assignments. In most of the states, unless an insolvent debtor chose to make a general assignment, he could not be forced to assign his property for distribution, and his creditors were left to enforce such common law remedies as they could against his property. That the right to make a general assignment for the benefit of creditors is not precluded by the passage of the federal bankruptcy law is clear upon principle, and has been settled by the Supreme Court of the United States.¹ For such an assignment takes effect not from any statute, but from the common law principles governing conveyances and trusts. If the owner of property may convey it to a trustee for one person, he may convey it to a trustee for any number of persons; that is, he may convey it to a trustee for the benefit of any or all of his creditors.

Prior to the enactment of the Bankruptcy Act of 1898 many of the states, however, had passed laws limiting the right of debtors to make general assignments, or giving a statutory effect to such assignments if certain rules were complied with. In many states preferences were forbidden; in others, the assignee or trustee under the assignment was required to settle the estate in performance of his trust under the supervision of the courts, which controlled the proof of claims by creditors and other matters, somewhat in the method of the bankruptcy court. In some states the debtor making the assignment was discharged from further liability to creditors who actually proved their claims.² A few states went even farther and allowed the debtor a discharge from all provable claims.³

It is obvious that statutes in the latter form approach very closely the portion of a bankruptcy law relating to voluntary petitions. The two objects of a bankruptcy law — equal distribution among creditors, and a discharge of the debtor from provable claims — are subserved. That so much of such a state statute as relates to the debtor's discharge is suspended by the federal law is

¹ *Mayer v. Hellman*, 91 U. S. 496; *Boese v. King*, 108 U. S. 379.

² Arizona, Arkansas, Indian Territory, New Jersey, South Carolina, Texas (if creditors receive $33\frac{1}{3}$ per cent dividend), Wyoming.

³ Colorado, Idaho, New York, Oregon, Washington, Wisconsin.

settled. And by a bare majority of the Supreme Court it has been also decided that the suspension of this portion of the statute does not invalidate the assignment itself.¹

In the decisions of state courts assignments made in compliance both with state laws and the principles of the common law have been upheld both under the Act of 1867² and under the Act of 1898.³ On the other hand, assignments which derive their validity from a state statute have been held void under the Act of 1867⁴ and under the law of 1898.⁵

A peculiar form of statute is in force in a few states which in certain instances operates as an involuntary transfer of the debtor's property. In Alabama, Connecticut, New Mexico, Pennsylvania, Tennessee, West Virginia, Wisconsin, it is enacted that an assignment with preferences by an insolvent debtor shall operate as an assignment of all his property for distribution ratably among his creditors. Such a statute has been held in Kentucky not to conflict with the national bankruptcy law and not to be suspended by it.⁶ It is submitted, however, that such decisions are erroneous. The state law, as a punishment of the debtor or redress to his creditors for an act which is contained in all bankruptcy statutes as an act of bankruptcy, enforces the very consequences which are provided for in the bankruptcy act; namely, the sequestration and

¹ *Boese v. King*, 108 U. S. 379. This case related to an assignment made under a New Jersey statute during the pendency of the federal act of 1867. The question involved was whether an assignment made under these circumstances was void. It was held by the court, Justices Mathews, Miller, Gray, Blatchford, dissenting, that the assignment was not void. It was conceded by the majority that "the local statute was from the date of the passage of the Bankruptcy Act inoperative in so far as it provided for the discharge of the debtor from further liability to creditors who came in under the assignment." But they held that as an assignment for the benefit of creditors was an effective common law conveyance, it did not cease to be so because of the statute. The minority of the court contended that the statute was an entirety, and the suspension of the provision relating to discharge involved the total invalidity of any conveyance made under the statute.

² *Hawkin's Appeal*, 34 Conn. 548; *Maltbie v. Hotchkiss*, 38 Conn. 80; *Geery's Appeal*, 43 Conn. 289; *Cook v. Rogers*, 31 Mich. 391; *Thrasher v. Bentley*, 59 N. Y. 649; *Beck v. Parker*, 65 Pa. 262.

³ *Patty-Joiner Co. v. Cummins*, 93 Tex. 598; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161; *Binder v. McDonald*, 106 Wis. 332; *Duryea v. Muse*, 117 Wis. 399. In both Texas and Wisconsin the court admitted that portions of the local statute providing for the debtor's discharge were superseded.

⁴ *Shryock v. Bashore*, 13 N. B. R. 481; *Rowe v. Page*, 54 N. H. 190.

⁵ *Ketcham v. McNamara*, 72 Conn. 709.

⁶ *Ebersole v. Adams*, 10 Bush (Ky.) 83; *Linthicum v. Fenley*, 11 Bush (Ky.) 131; *Downer v. Porter*, 25 Ky. L. Rep. 571, 76 S. W. 135.

distribution of the debtor's property. And the Pennsylvania law has been held suspended by the federal statute.¹

A similar situation arises in regard to receiverships of insolvent corporations. The appointment of receivers is not dependent on statute. It is a recognized branch of equity jurisprudence. The primary object of their appointment is to protect the rights of a plaintiff as a mortgagee or judgment creditor; and the ratable distribution of an insolvent estate in the hands of the receiver, when it occurs, is due to the desire of the court of equity, which has once taken jurisdiction, to dispose equitably of the property under its control. In England receiverships are allowed by the side of bankruptcy laws. There is, therefore, no reason to suppose that in this country the mere fact that Congress has passed a bankruptcy law should suspend the ordinary equity powers of state courts to appoint receivers; and such seems to be the generally accepted view.² But in much the same fashion that state legislation in some jurisdictions has annexed incidents of bankruptcy legislation to assignments for the benefit of creditors, so statutes have been passed regulating receiverships, and in some instances adding rules of law in regard to them appropriate for bankruptcy legislation. Such statutes must be suspended at least to the extent to which they infringe upon the field appropriate for bankruptcy legislation, and it has been held in Maine,³ Pennsylvania,⁴ and Rhode Island,⁵ that local statutes of this sort were suspended. It does not follow, however, that the ordinary equity jurisdiction to appoint a receiver is lost because a federal bankruptcy statute has been passed.

If bankruptcy proceedings are begun against a corporation for which another court has appointed a receiver, the receiver must surrender the property.⁶ Comity, however, requires that applica-

¹ *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206; *Peckham's Assigned Est.*, 35 Pa. Super. Ct. 330.

² *Chandler v. Siddle*, 10 N. B. R. 236; *State v. Superior Court*, 20 Wash. 545. See also *Watson v. Citizens' Savings Bank*, 5 S. C. 159. And the general practice of state courts to this effect is indicated by the decisions cited in notes 6 and 1, *infra*, where the primary question concerned the obligation of the receiver appointed by the state court to surrender the property in his hands to the bankruptcy court.

³ *Moody v. Port Clyde Development Co.*, 102 Me. 365.

⁴ *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206; *Peckham's Est.*, 35 Pa. Super. Ct. 330.

⁵ *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324.

⁶ *Re Watts*, 190 U. S. 1; *Re Storck Lumber Co.*, 114 Fed. 360; *Re Knight*, 125 Fed. 35; *Re English*, 127 Fed. 940, 62 C. C. A. 572; *Re C. Moench & Sons Co.*, 130 Fed. 685, 666 C. C. A. 37.

tion be made to the court which appointed the receiver requesting the surrender of the property.¹ Whether the receivership was begun more or less than four months prior to the bankruptcy proceedings should make no difference unless the suit in which the receiver was appointed operated as an equitable attachment of the property.² If such was the case, and the attachment was more than four months old, the receiver would be entitled to retain the property as a means of enforcing the creditor's equitable attachment.³ Another exception to the obligation of a receiver to surrender immediately to the bankruptcy court arises where the receivership is incidental to the foreclosure of a creditor's valid mortgage or lien. As the bankruptcy court does not generally interfere with the right of a secured creditor to enforce his claim against his security, in the same way he would have done had bankruptcy not supervened,⁴ the receiver may properly continue to hold the property as a step to such enforcement.⁵ It must be remembered, however, that a court of bankruptcy has power even in such a case, if it deems it for the advantage of those interested in the property, to order a sale of the security free from mortgages and liens after due notice has been given to the mortgagees or lien holders so that they have an opportunity to defend their interests.⁶

¹ *Re Watts*, 190 U. S. 1; *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 491, 51 C. C. A. 1; *Ross-Meeham Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. 403; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324.

² *Re English*, 127 Fed. 940, 62 C. C. A. 572.

³ *Pickens v. Roy*, 187 U. S. 177. In *Frazier v. Southern Loan & Trust Co.*, 99 Fed. 707, Goff, J., said: "The Bankruptcy Act of 1898 does not in the least modify this rule [that a court which first obtains rightful jurisdiction over the subject matter of a suit should not be interfered with], but with unusual carefulness guards it in all its detail, provided the suit pending in the State Court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject matter of such controversy." And this passage was quoted with approval in *Pickens v. Roy*, 187 U. S. 177, but it seems that the principle as applied in bankruptcy should be confined to cases where the appointment of a receiver creates an equitable lien in favor of the plaintiff. The mere fact that a state court is in possession and has been in possession of property for a long time should not limit the right of the federal bankruptcy court to the possession of the property if it belongs to a bankrupt. The principle enunciated by Judge Goff is applicable in its entirety only where the competing courts are of coördinate jurisdiction, while the bankruptcy court in regard to bankruptcy matters is a court of superior jurisdiction. See *Re Watts*, 190 U. S. 1.

⁴ *Eyster v. Gaff*, 91 U. S. 521; *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A. 1; *Harvey v. Smith*, 179 Mass. 592.

⁵ *Ross-Meeham Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. 403.

⁶ *Ray v. Norseworthy*, 23 Wall. (U. S.) 128, 135; *Re Pittelkow*, 92 Fed. 901, and

Where this procedure is adopted the secured creditor is remitted to a right against the proceeds of the security corresponding to that which he previously had against the security itself.

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cases cited; *Re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316; *Sturgiss v. Corbin*, 141 Fed. 1, 72 C. C. A. 179. See also *Re Kaplan*, 144 Fed. 159; *Orr v. Tribble*, 158 Fed. 897.

THE OBLIGATIONS OF PUBLIC SERVICES TO MAKE CONNECTIONS.

THE law relating to connecting services is quite voluminous, but upon the matter with which the present paper is concerned there is as yet very little authority. There are, for example, many cases as to the respective liabilities of connecting carriers, but very few as to the duty of an unwilling carrier to participate in connecting carriage. The problem cannot be dismissed by saying that for a carrier to make arrangements with one connection while refusing to do the same with another is illegal discrimination, for that this is true only to the extent that public duty is involved; so that the fundamental question is, as always, the extent of the duty of a railroad in dealing with connecting railroads. May it refuse altogether to have dealings with them, to accept goods from them, for example? Obviously this will not do; it is the duty of the railroad as a common carrier to accept from any person tendering goods. On the other hand, it can hardly be said that the railroad must accord to all railroads every special privilege that it gives one railroad in a joint traffic agreement; for what it does for one as a favor, another cannot demand as a right. The truth of this matter must therefore lie between two extremes in some practicable compromise that will meet the necessities of the public while recognizing as far as may be the independence of the carriers.

I.

Of the duty of the initial company to undertake service to the point of connection with the succeeding company there can be no doubt. If it be a case of carriage, the initial carrier is certainly asked no more than to act within his profession if he is requested to take certain goods tendered at one point on his line to another point where that line connects with the second carrier.¹ This elementary point has been most litigated in recent times in regard to telegraph companies, the initial company sometimes disliking to accept a message to a connecting point, there to be delivered to

¹ *Fremont, E. & M. V. R. R. Co. v. Waters*, 50 Neb. 592 (1897); *Hooper v. Chicago & N. Ry. Co.*, 27 Wis. 81 (1870).

another company, very often a competitor. But the established duty in regard to connecting carriage was too close an analogy for the telegraph company to escape it.¹ This was plainly said in a Texas case:² "The law relating to the receiving and forwarding of telegraphic messages to connecting lines is so nearly analogous to that in regard to common carriers that the established rules of law that determine the liability of the common carrier apply with equal force to telegraph companies. Each can restrict its liability to its own line, but each must receive and forward with diligence to the connecting line, and each will be held liable for its failure or refusal to perform that duty." There is but one peculiarity in the telegraph situation, and that is because of difference in the conditions. In the case of carriage there are usually marks on the package designating its course; moreover its bills accompany it. In the case of the telegraph, therefore, it is a reasonable requirement by the first company that words designating the connection desired shall be sent with the message, or the second company may require that words designating its origin shall be paid for.³

In several kinds of connecting service the duty of each successive party to deliver over to the next in turn is the normal one. Thus, as a telegraph company undertakes delivery in the place of address, which in this case should be at the office of the telegraph company designated as the connection. So, in certain kinds of carriage, as express service, the carrier is bound to deliver to the addressee. But railroads and steamboats are not normally bound to do more than deposit the goods carried on their own wharves or at their own terminal. There is thereupon, as all will remember, a conflict of authority as to how soon they cease to be liable as common carriers; but at all events it must be very soon thereafter without any attempt on their part to make delivery. But in the case of connecting carriage there is no conflict of authority, the whole matter being handled upon a different basis. It is universally established that when successive carriage is involved the law necessarily throws upon the accepting carrier the duty of tendering the goods for further transportation to the succeeding carrier; and normally, until he effectuates such delivery, the original carrier remains liable as a common carrier.⁴ This liability

¹ *United States v. Northern Pac. R. Co.*, 120 Fed. Rep. 546 (1903).

² *W. U. Telegraph Co. v. Simmons*, 93 S. W. 686 (Tex. Civ. App.) (1906).

³ *Atlantic & Pacific Telegraph Co. v. W. U. Telegraph Co.*, 4 Daly (N. Y.) 527 (1873).

⁴ *Mount Vernon Co. v. Ala. Gt. S. R. R. Co.*, 92 Ala. 296 (1890); *Palmer v.*

would usually continue, as the cases just cited hold, until the first carrier had deposited the goods where the second carrier receives them, and given notice, as would generally be requisite, to the succeeding carrier that the goods were there awaiting his transportation,¹ together with the necessary instructions for forwarding the goods.² If, however, the second carrier finally refuses the goods, the first carrier has performed its duty as such. But there rests upon it in this case, as in many other cases of unexpected interruption, the duty to store the goods³ refused, and notify the consignor of the situation.⁴

II.

Of the duty to receive what is properly tendered to it by its predecessor also there can be no doubt. This really relates back to the primary duty to the original person requesting the service.⁵ It

Chicago, B. & Q. R. R. Co., 56 Conn. 137 (1888); Wallace v. Rosenthal, 40 Ga. 419 (1869); Illinois Central R. R. Co. v. Mitchell, 68 Ill. 471 (1873); Moore v. Michigan Central R. R. Co., 3 Mich. 23 (1853); Dunson v. New York Central R. R. Co., 3 Lans. (N. Y.) 265 (1870); Miller Bros. v. Railway Co., 33 S. C. 359 (1890); Insurance Co. v. Railroad Co., 8 Baxt. (Tenn.) 268 (1874); Lewis v. Chesapeake & Ohio Ry. Co., 47 W. Va. 656 (1900); Hooper v. Chicago & N. Ry. Co., 27 Wis. 81 (1870).

¹ Myrick v. Michigan Cent. R. R. Co., 9 Biss. (U. S.) 44 (1879); Selma, etc., R. R. Co. v. Butts & Foster, 43 Ala. 385 (1869); Colfax Mountain Fruit Co. v. Southern Pac. Co., 46 Pac. 668 (1896) (Cal.); Palmer v. Chicago, B. & Q. R. R. Co., 56 Conn. 137 (1888); Louisville, St. L. & Texas Ry. Co. v. Bourne & Embry, 16 Ky. L. Rep. 825 (1895); Rickerson Roller Mill Co. v. Grand Rapids & I. R. R. Co., 67 Mich. 110 (1887); Dunn v. Hannibal, etc., R. R. Co., 68 Mo. 268 (1878); Sprague v. New York Cent. R. R. Co., 52 N. Y. 637 (1873).

² Michigan S. & N. I. R. R. Co. v. Day, 20 Ill. 375 (1858); Hutchings v. Ladd, 16 Mich. 493 (1868); Sherman v. Hudson River R. R. Co., 64 N. Y. 254 (1876); Little Miami R. R. Co. v. Washburn, 22 Oh. St. 324 (1872); Forsythe v. Walker, 9 Pa. St. 148 (1848); Railroad v. Cabinet Co., 104 Tenn. 568 (1900); Fort Worth & D. C. Ry. Co. v. Masterton, 95 Tex. 262 (1902).

³ Buston v. Pennsylvania R. Co., 119 Fed. 808 (1903); Louisville & N. R. R. Co. v. Duncan & Orr, 137 Ala. 446 (1902); Dalzell v. Steamboat Saxon, 10 La. Ann. 280 (1855); Baltimore & Ohio R. R. Co. v. Schumacher, 29 Md. 168 (1868); Wehmann v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 58 Minn. 22 (1894); Rawson v. Holland, 59 N. Y. 611 (1875); Bird v. Railroad, 99 Tenn. 719 (1897); Wood v. Milwaukee & St. P. Ry. Co., 27 Wis. 541 (1871).

⁴ *In re Peterson*, 21 Fed. 885 (1884); Louisville & N. R. R. Co. v. Farmers, etc., Live Stock Commission Firm, 21 Ky. L. Rep. 708 (1899); Fisher v. Boston & Maine R. R. Co., 99 Me. 338 (1904); Cramer v. American M. U. Express Co. & Merchants Dispatch Co., 56 Mo. 524 (1874); Lesinsky v. Great Western Dispatch, 10 Mo. App. 134 (1881); Johnson v. New York Central R. R. Co., 33 N. Y. 610 (1865); Louisville, etc., R. R. Co. v. Campbell & Richards, 7 Heisk. (Tenn.) 253 (1872).

⁵ The initial carrier is not, in cases of successive carriage, liable to the shipper for the refusal of the succeeding carrier to accept the goods. *Dunbar v. Port Royal, etc.*,

is to him that the succeeding carrier makes default when there is a refusal by the succeeding carrier he has designated upon tender of the goods by that preceding carrier as the agent of the shipper to that succeeding carrier.¹ "It is established law, made necessary from the character of the business, that it is the duty of common carriers to accept freight tendered by another common carrier, and that a consignor of goods to be carried over successive routes makes the first and each successive carrier his forwarding agent. This is from the necessities of the case. The consignors cannot practically travel with the goods which are shipped, and there must be some one who is responsible for transactions in regard to their shipment over the different routes. Each succeeding carrier who takes charge of the goods is responsible for the goods, and therefore becomes an agent of the consignor for the goods."² Similarly a second telegraph company chosen as the connection is in default when it refuses to accept a message tendered on behalf of its patron by the initial company.³ It follows that the connecting company can make no unreasonable requirement which would seriously interfere with the course of through service. A connecting railroad cannot require as to freight tendered by a connection that the shippers must themselves appear at the point of connection, and rebill their goods.⁴ Nor can a telegraph company make the vexatious requirement that it will not recognize the tendering company as the agent of the sender unless he files a written power of attorney.⁵ "This was imposing what was practically impossible in the due and speedy transmission of a message which was to go to Europe; for to carry out such a regulation as this the despatch when recorded at New York would have to be

Ry. Co., 36 S. C. 110 (1891). On the contrary, it is the refusing carrier who is liable directly to the shipper for such refusal. *Crosby v. Pere Marquette R. R. Co.*, 131 Mich. 288 (1902).

¹ *Dunham v. Boston & M. R. R. Co.*, 70 Me. 164 (1879); *Gulf & Interstate Ry. Co. v. Texas & N. O. Ry. Co.*, 93 Tex. 482 (1900); *Sterling v. St. Louis, I. M. & S. Ry. Co.*, 38 Tex. Civ. App. 451 (1905).

² The quotation is from *Andrus v. Columbia & O. Steamboat Co.*, 47 Wash. 333 (1907).

³ *Thurn v. Alta Telegraph Co.*, 15 Cal. 472 (1860); *Conyers v. Postal Telegraph Cable Co.*, 92 Ga. 619 (1893); *Western Union Telegraph Co. v. Carew*, 15 Mich. 525 (1867); *Telegraph Company v. Munford*, 87 Tenn. 190 (1888); *Western Union Telegraph Co. v. Simmons*, 93 S. W. 686 (1906) (Tex. Civ. App.).

⁴ See *Dunham v. B. & M. R. R.*, 70 Me. 164.

⁵ The quotation is from *Atlantic & Pacific Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527 (1873).

kept there until the plaintiff could in each case receive the power of attorney by mail."

The patron may himself decide by what successive parties he wishes the service performed, and from these directions the parties would usually deviate at their peril.¹ Consequently a rule of a telegraph company that messages will be taken only by the most direct connections notwithstanding the sender's instructions is inconsistent with its duty.² But even if such explicit directions are given, the forwarding party should notify the patron if he knows that the use of the connection designated will probably cause unusual delay;³ and if it later turns out that the route designated is impracticable, another may be taken.⁴ Failure of the previous party to transmit his instructions to his successor is a breach of duty to the patron, and for the consequential deviation that party is liable.⁵ And if the succeeding party knew of the violation of the instructions, he is also subject to all the disabilities of one concerned in a deviation.⁶ On the question of the position of a second party when a first party acts contrary to instructions without disclosing that he is doing so, some few cases⁷ have held that the shipper may repudiate the subsequent transaction; but by the present weight of authority it is held that in forwarding goods to their destination by another connection than the one designated, the first carrier is held out to the second carrier as having apparent authority;⁸ so that the second carrier even has a lien upon the goods not

¹ *Georgia R. R. Co. v. Cole & Co.*, 68 Ga. 623 (1882); *Brown & Haywood Co. v. Pennsylvania Company*, 63 Minn. 546 (1896); *Hinckley v. New York Central & Hudson River R. R. Co.*, 56 N. Y. 429 (1874); *Congar v. Galena & Chicago U. R. R. Co.*, 17 Wis. 477 (1863).

² *Western Union Telegraph Co. v. Turner*, 94 Tex. 304 (1901).

³ *Inman & Co. v. St. L. S. W. Ry. Co.*, 14 Tex. Civ. App. 39 (1896).

⁴ *Regan v. Grand Trunk Ry.*, 61 N. H. 579 (1881).

⁵ *Harding v. International Navigation Co.*, 12 Fed. 168 (1882); *Hutchings v. Ladd*, 16 Mich. 493 (1868); *Dana, Agt. N. Y. Cen. & Hudson River R. R. Co.*, 50 How. Pr. (N. Y.) 428 (1875); *Little Miami R. R. Co. v. Washburn*, 22 Oh. St. 324 (1872); *Forsythe v. Walker*, 9 Pa. St. 148 (1848); *Booth v. Missouri K. & T. Ry. Co.*, 37 S. W. 168 (1896) (Tex.).

⁶ *Patten v. Union Pac. Ry. Co.*, 29 Fed. 590 (1886); *Denver & R. G. Ry. Co. v. Hill*, 13 Colo. 35 (1889); *Georgia R. R. Company v. Cole & Co.*, 68 Ga. 623 (1882); *Robinson v. Baker*, 5 Cush. (Mass.) 137 (1849); *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen (Mass.) 246 (1863); *Johnson v. New York Central R. R. Co.*, 33 N. Y. 610 (1865); *Philadelphia, etc., R. R. Co. v. Beck*, 125 Pa. St. 620 (1889).

⁷ *Fitch v. Newberry*, 1 Doug. (Mich.) 1 (1843).

⁸ *Price v. Denver & R. G. Ry. Co.*, 12 Colo. 402 (1888); *Bird v. Georgia R. R.*, 72 Ga. 655 (1884); *Crossan v. N. Y. & N. E. R. R. Co.*, 149 Mass. 196 (1889); *Bowman v. Hilton*, 11 Oh. 303 (1842); *Knight v. Prov. & Worc. R. R. Co.*, 13 R. I. 572 (1882).

only for his own charges, but for those which he had advanced against them relying upon the authority of the first carrier. It is needless perhaps to add that if the patron leaves forwarding to the discretion of the initial party, he is bound to the disposition which his agent makes, the agent himself being liable for proper discretion in choosing the connection.¹

III.

As all obligations of the succeeding party to undertake service may thus be related back to the rights of the original patron whom the preceding party represents, the succeeding party may refuse to do anything not within its duty to patrons generally for customers using particular agencies, even though it would accept if another connection had tendered. Thus it may refuse to render its service when they are requested through one connection unless its charges are tendered it or secured to it, although it does not generally insist upon prepayment;² and, of course, it may refuse in taking over from one connection to advance the previous charges, although it does this in its dealings with other connections.³ There have been some cases dealing with the obligations of connecting

¹ *Snow v. Indiana, B. & W. Ry. Co.*, 109 Ind. 422 (1886); *Simkins v. Norwich & N. L. Steamboat Co.*, 11 Cush. (Mass.) 102 (1853); *Post v. Railroad*, 103 Tenn. 184 (1899).

It would not seem that it would be a difficult question to determine whether a particular case really involves connecting service with its accompanying obligations; and yet certain decisions will show that this problem may be very difficult. Thus a transfer company employed by one carrier to transfer the goods to the next carrier, or a cartage company employed by the last carrier to deliver the goods to the consignee, or a stockyard to which a railroad delivers cattle, or a telephone used to deliver a telegram, or a hackman employed by a passenger at a railroad station, or a teamster employed by the consignee to remove goods from the carrier's station, — are none of them connecting services. These are not all of the same class, although they come to the same result. In the transfer, cartage, stockyards, and telegraph cases there is no connecting service, because the patron is dealing with but one service which uses the others as a subordinate instrumentality to perform its service. In the hackman and teamster cases the patron employs the additional service upon a separate basis altogether. But as to both sets of cases the law is that the particular service is free to make arrangements without regard to the peculiar law governing connecting service.

² *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. 400 (1894); *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775 (1894).

³ *Southern Indiana Exp. Co. v. United States Exp. Co.*, 92 Fed. 1022 (1899); *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407 (1898); *Baltimore & O. R. Co. v. Adams Express Co.*, 22 Fed. 32 (1884); *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. R. Co.*, 61 Fed. 158, 15 U. S. App. 479 (1894).

express companies in recent years in which both aspects of the problem were discussed. To quote from one¹ of them: "The same rule applies whether the articles of trade and commerce are received from the original consignor or from a connecting carrier. An express company, in the absence of contract, is under no obligation to receive and transport for the original consignor, or to continue the transportation for a connecting carrier, without the prepayment of its charges if demanded. The furnishing of equal facilities, without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers because it extends credit for such services to others."²

But no policies can be adopted inconsistent with public duty whereby business coming from one connection is favored. Thus, in one of the early cases in public service, *Bennet v. Dutton*,³ still a leading case, it was held that a stage line running from Nashua to Amherst could not adopt the rule of taking passengers who came from Lowell to Nashua on French's line and refuse those who came on Tuttle's line. In that pioneer case Chief Justice Parker, after stating the general principles of public duty, thus applied them to the case in hand: "The defendant might well have desired that passengers at Lowell should take French's line because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished because he had come to Nashua in a particular manner."⁴

¹ *Southern Indiana Express Co. v. United States Express Co.*, 88 Fed. 659 (1898).

² *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 61 Fed. 158 (1894); 51 Fed. 465 (1892); *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775 (1894); *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559 (1890).

³ 10 N. H. 481 (1839).

⁴ But the Chief Justice added, and this is good law also: "The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua."

IV.

One thing is as certain as anything can be at common law in this doubtful subject, and that is that those who have provided certain facilities in order to give a designated service are under no obligation to go beyond the service they have professed and substantially extend their existing facilities so as to make physical connection with another service. To require this would be wholly outside the accepted theory of the proper restriction of public obligation to the profession made. In a leading federal case¹ in refusing to order a railroad company to make connections with a switching company, notwithstanding the general requirements for proper treatment of connecting carriers in the interstate commerce legislation, one of the principal points made by the court was this: "Neither this nor any other provision of the law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights. The act to regulate commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots for the accommodation of their business, the law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or other carriers." However in some jurisdictions recently more explicit statutes have been passed providing that when two services nearly approach each other short lines for making connections should be constructed.² And if this requirement is properly safeguarded, it must be admitted that the legislation is not so outrageous as to be unconstitutional.³

The traditional rule at common law has been that there is no obligation to permit connection at junction points.⁴ This cer-

¹ Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567 (1889).

² Rutland R. R. Co. *v.* Bellows Falls & S. R. St. Ry. Co., 73 Vt. 20 (1900).

³ This particular problem is really bound up in the general problem as to the extent of the duty to provide spur tracks for special business, upon which there is still doubt upon the authorities.

⁴ Shelbyville R. R. Co. *v.* Louisville, C. & L. R. R. Co., 82 Ky. 541 (1885); Pennsylvania R. R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263 (1883).

tainly cannot be true if there is a public station at that point, for at such a station, as has just been seen, goods must be received whether tendered by a connection or any one else. It may be true that there is not as yet an obligation to stop for the exchange of business at junction points, as such, where no station has been established, as the United States Supreme Court has held.¹ It may even be true that there is no obligation to accept business at a private station from one connection, even if business is there accepted from another, as the federal courts have also held.² But if there is a sufficient amount of business that would usually be tendered at a junction if a station should be opened, ought there not to be a public station established at that precise point? A New Hampshire court³ has gone so far as to say that a union station ought to be built by two roads which made connections in a city, if it were shown that public convenience required it.⁴

V.

As to whether transportation must be given to the goods offered by a first carrier to a second carrier in the cars in which they are tendered by the first carrier, regardless of the desires of the second carrier, there is still some conflict of authority. In *Oregon Short Line and Utah Northern Railway Company v. Northern Pacific Railroad Company*,⁵ the utilization of foreign cars being in question, the law as it then stood was summarized thus by Mr. Justice Field: "As the receiving company is under no obligation to take the freight in the cars in which it is tendered, and transport it in such cars, when it has cars of its own not in use to transport it, there can be no custom that it shall pay the owner of such cars, should it receive them in such case, car mileage for their use. The car mileage in that case must be upon an arrangement be-

¹ *Atchison R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667 (1884); *St. Louis & S. F. Ry. Co. v. Marrs*, 31 S. W. 42 (1895) (Ark.).

² *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407 (1898); *Ilwaco Ry., etc., Co. v. Oregon Short Line, etc., Ry. Co.*, 57 Fed. 673 (1893).

³ *Concord & M. R. R. Co. v. Boston & Me. Ry. Co.*, 67 N. H. 465 (1893).

⁴ This particular problem is also bound up in a general problem as to the jurisdiction of the courts to order the establishment of stations, as to which a square conflict of authority still persists.

⁵ 51 Fed. 465 (1892). See also *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. 400, apparently *accord.* (1894). But see *Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.*, 34 Fed. 481, apparently *contra* (1888).

tween the parties. But when the receiving company takes the freight in the foreign cars because it has none of its own out of use to transport it, or because it would injure the freight to transfer it to its own cars, it is the general practice for the receiving company to pay the usual mileage on the cars taken and used, and such practice is a reasonable one, and should be enforced." It should be added that there is certainly no duty to accept cars which are not of a character to fit in with the equipment of the company to which they are tendered or in such a defective condition as to be dangerous.¹

On the other hand, there are several cases, although many of them are based upon statute, which hold that the railroad is obliged to accept the cars of another road filled with goods and carry them through to their destination. In an opinion written by Mr. Justice Cooley, in the case of *Michigan Central Railroad Company v. Smithson*,² is the following statement, which probably represents the present law: "The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose, and which are upon wheels adapted to its gauge. It is compelled to do so, first, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to any one. It is compelled to do so, second, by its own interest. To attempt to stop every car offered to it at its termini, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic and compel it to rely upon a local business."³ Where this duty to receive the

¹ *Chicago, B. & Q. R. R. Co. v. Curtis*, 51 Neb. 442 (1897); *Texas & Pac. Ry. Co. v. Carlton*, 60 Tex. 397 (1883).

² 45 Mich. 212 (1881).

³ See, to the same effect: *Rae v. Grand Trunk Ry. Co.*, 14 Fed. 401 (1882); *Louisville & N. R. R. Co. v. Boland*, 96 Ala. 626 (1892); *Peoria & P. M. Ry. Co. v. Chicago, R. I. & Pac. Ry. Co.*, 109 Ill. 135 (1884); *Baldwin v. Railroad*, 50 Ia. 680 (1879); *Burlington, etc., Ry. Co. v. Dey*, 82 Ia. 312 (1891); *Louisville, etc., R. R. Co. v. Williams*, 95 Ky. 199 (1893); *Vermont & M. R. R. v. Fitchburg R. R.*, 14 Allen (Mass.) 462 (1867); *Mackin v. Boston & A. R. R.*, 135 Mass. 201 (1883); *Thomas v. Mo. Pac. Ry. Co.*, 109 Mo. 187 (1891); *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442 (1897); *Hudson Valley Ry. Co. v. Boston & M. R. R. Co.*, 45 N. Y. Misc. 520 (1904); *Gulf, C. & S. F. Ry.*

cars is established, it is certainly true that the second railroad can make no charge for hauling the cars independently of the regular freight for their contents.¹ On the other hand, it is probable that the second carrier is not under any more obligation to pay mileage for the use of the cars than is stated in the preceding paragraph.²

VI.

However, there was certainly no disagreement at common law as to the proposition that shippers cannot insist that the initial carrier shall provide them with sufficient cars for the transportation of their goods to any part of the continent; for the carrier's obligation to provide equipment was always held limited to service over his own route.³

But apparently it is not impossible that statutes may even go to the length of requiring such service by reason of commercial necessity. In a very late case,⁴ in declaring unconstitutional a statute requiring a railroad to furnish its cars for through transportation off its own route, the United States Supreme Court based its decision upon the point that the statute did not provide sufficient safeguards, not even providing for compensation; but the court suggested that all such legislation is not necessarily unconstitutional: "It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough

v. Lone Star Salt Co., 26 Tex. Civ. App. 531 (1901); *Texas & Pacific Ry. Co. v. Texas Short Line R. R. Co.*, 35 Tex. Civ. App. 387 (1904); *Texas & Pac. Ry. Co. v. Carlton*, 60 Tex. 397 (1883).

¹ *Harrison v. Midland R. Co.*, 62 L. J. Q. B. N. s. 225 (1893). But query whether a shipper can get his own cars hauled thus for nothing. *Green Bay Lumber Co. v. Chicago, R. I. & P. Ry. Co.*, 102 Ia. 292 (1897).

² *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 61 Fed. 158 (1894).

³ *Pittsburg, Cincinnati & St. Louis R. W. Co. v. Morton*, 61 Ind. 539, 576 (1878). The same doctrine is held in *Houston & T. C. Ry. v. Buchanan*, 42 Tex. Civ. App. 620 (1906).

⁴ *Louisville & Nashville R. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 143 (1909); citing *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 559, 562 (1906).

to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described.”¹

VII.

At common law one public service could not be compelled to enter into arrangements with another for continuous service as a single unit for a single rate which they will later divide between themselves, — such arrangements being left altogether to private agreement. This is well explained in the leading case in the United States Supreme Court, *Atchison, Topeka & Santa Fe R. R. v. Denver & New Orleans R. R.*,² where it was squarely held that a railroad might enter into through traffic agreements with one railroad, pro-rating its through rate, and at the same time refuse to enter into a similar agreement with another railroad traversing the same territory as the first and having the same terminus. To quote but one paragraph from the elaborate opinion of Chief Justice Waite: “At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He

¹ This right to have facilities for interchange of business must not be pressed beyond the duty to permit connections. A connecting service cannot insist upon the utilization of the facilities of a succeeding service to carry on a competing business. The original patron has no right to this sort of service, nor has the initial service in his behalf. There is some law upon this point; but this is plainly outside the present problem.

² 110 U. S. 667 (1884).

certainly may select his own agencies and his own associates for doing his own work."¹

It follows plainly enough that the initial carrier has entire control over the situation.² In the recent Citrous Fruit case in the United States Supreme Court³ the policy of the Pacific railroads, under which the right of routing beyond its own terminal was reserved to the initial carrier to exercise in his discretion at any stage as the condition of guaranteeing through rates to the shipper, was held its right beyond question. As the court tersely said in its decision, "The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract, the carrier may make such terms as it pleases, at least so long as they are reasonable and do not otherwise violate the law."

VIII.

This modern conception of the fuller extent of the public duty to all concerned in relation to the making of connections has manifested itself of late in many statutes, requiring proper arrangements for the interchange of business at junction points, which now receive more respect from the courts than they once did. Indeed

¹ These doctrines also prevail generally in the state courts. *Southern Indiana Exp. Co. v. United States Exp. Co.*, 92 Fed. 1022 (1899); *Coles v. Central Railroad Co.*, 86 Ga. 251 (1890); *State v. Wrightsville & T. R. Co.*, 104 Ga. 437 (1898); *Snow v. Indiana, B. & W. Ry. Co.*, 109 Ind. 422 (1886).

² Citation should be made here of the many cases which held that the original Interstate Commerce Act left the railroads free as before, to make such arrangements for through routing, billing, or rating as they pleased without its being a refusal of equal facilities for the interchange of traffic to make such through arrangements with one company while refusing to do so with another. *Central Stock Yards Co. v. Louisville & N. Ry.*, 192 U. S. 568 (1904); *Kentucky & I. Bridge Co. v. Louisville & N. R. R.*, 37 Fed. 567, 629, 630 (1889); *Little Rock & M. R. R. Co. v. St. Louis, I. M. & S. Ry.*, 41 Fed. 559 (1890); *Chicago & N. W. Ry. v. Osborne*, 52 Fed. 912 (1892); *Oregon Short Line & U. N. Ry. v. Northern P. R. R.*, 61 Fed. 158 (1894), affirming 51 Fed. 465 (1892); *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.*, 63 Fed. 775 (1894); *St. Louis Drayage Co. v. Louisville & N. R. Co.*, 65 Fed. 39 (1894); *Prescott & A. C. R. Co. v. Atchison T. & S. F. R. Co.*, 73 Fed. 438 (1896); *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407 (1898); *Allen v. Oregon R. & Nav. Co.*, 98 Fed. 16 (1899). But see (practically overruled) *New York & N. Ry. Co. v. New York & N. E. R. Co.*, 50 Fed. 867 (1892); *Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522 (1896).

³ *Southern Pacific Company v. Interstate Commerce Commission*, 200 U. S. 536 (1906).

the powers granted commissions in this respect now go so far as to authorize the making of orders as to running of trains by the intersecting roads, so as to make convenient connections.¹ It is characteristic of the new appreciation of the extent of public duty that the United States Supreme Court found no difficulty even with this extreme type of regulation:² "This reduces itself to the contention that, although the governmental power to regulate exists in the interest of the public, yet it does not extend to securing to the public reasonable facilities for making connection between different carriers. But the proposition destroys itself, since at one and the same time it admits the plenary power to regulate and yet virtually denies the efficiency of that authority. That power, as we have seen, takes its origin from the *quasi*-public nature of the business in which the carrier is engaged, and embraces that business in its entirety, which of course includes the duty to require carriers to make reasonable connections with other roads, so as to promote the convenience of the traveling public. In considering the facts found below as to the connection in question, that is, the population contained in the large territory whose convenience was subserved by the connection, and the admission of the railroad as to the importance of the connection, we conclude that the order in question, considered from the point of view of the requirements of the public interest, was one coming clearly within the scope of the power to enforce just and reasonable regulations."

But the statutes are going further than to make the common law more intensive; they are making the legal obligation more extensive. The common law right of the initial company to make through traffic arrangements with some one connecting line and throw all the business which it will take at the through rate into the hands of that one line, notwithstanding the wishes of the shipper, has, of late, caused such fears that statutes are being passed giving the power to the regulating body to compel the making of a joint rate. This power was given to the English Railway and Canal Commission in 1888, and to the Interstate Commerce Commission in 1906. The federal legislation had been foreshadowed, as usually has happened, by some legislation in

¹ *Louisville & N. R. R. Co. v. Pittsburg, etc., Coal Co.*, 111 Ky. 960 (1901); *Louisville & N. R. Co. v. Central Stockyards Co.*, 30 Ky. Law Rep. 18 (1906); *Jacobson v. Wisconsin, M. & P. R. R. Co.*, 71 Minn. 519 (1898); *State of Missouri v. St. Louis & S. F. R. R. Co.*, 105 Mo. App. 207 (1904).

² *Atlantic Coast Line v. North Carolina Corp. Com'n*, 206 U. S. 1, 22 (1907). See also *Southern Railway Co. v. Commonwealth*, 98 Va. 758 (1900).

the various states, Minnesota and Texas for example. It will be noticed that the commission by these statutes is to judge as to whether public convenience requires the additional through routes asked. The shipper, therefore, now as before has no rights in the matter until the through rate has been duly established; then, of course, he may demand it, as a Texas case holds.¹ The question has been raised as to whether such statutes are constitutional; but in view of the modern notion of obligatory connection for proper service for all concerned, there seems to be little doubt. In holding the Minnesota statute valid,² Mr. Justice Collins said: "We see no reason why, under the amendatory act, the commission cannot lawfully compel a joint arrangement in a case like this. The evidence shows that the location of the Duluth road and the Minneapolis and St. Louis road, their track facilities, equipment, etc., are such that, by operating together under joint traffic agreements, the cost of the service can be greatly lessened. The public has, at least, a right to share in the benefits of this condition. If it is judicious to do so and of public benefit to have joint traffic arrangements in any given case, why should not the public be permitted to compel that such arrangements be made?"

Bruce Wyman.

¹ *Inman v. St. Louis S. W. Ry. Co.*, 14 Tex. Civ. App. 39 (1896).

² *State v. Minneapolis & St. L. R. R. Co.*, 80 Minn. 191 (1900).

THE GENESIS OF ROMAN LAW IN AMERICA.

SOME few years ago the Judicial Committee of the English Privy Council, in a case which came before it on appeal from the Court of King's Bench for Quebec,¹ encountered some difficulty in the interpretation of a certain clause in the Civil Code of the Province of Quebec.² The clause in question had, it appeared, been borrowed almost literally by the framers of the Quebec codification from the Code Napoléon of France.³ Resort was had, therefore, to this latter compilation, whereupon it further appeared that the provision had been condensed by the Napoleonic jurists from a passage in the works of a well-known commentator on the laws of France during the old régime.⁴ As the code provision needed elucidation, further reference was accordingly made to this commentary, only to find that the commentator had drawn his rule from the Roman Digest.⁵ The judges thereupon went back to the Justinian compilation, and here they found the rule of law set forth in such clear terms as to enable them to give decision with entire confidence.

This is an interesting illustration of the continuity of legal evolution: it affords testimony to what Mr. Bryce has emphasized as the vitality of the Roman jurisprudence, and of its contemporary application to immense areas which never knew the Roman sway.⁶ At the first glance this instance, and many others like unto it, would seem capable of very easy explanation. French law is based on Roman; the French colonized Canada; they introduced their own law; the English, when they came, retained it; hence the Roman law very naturally forms the groundwork of Quebec civil jurisprudence in the twentieth century. This simple explanation

¹ Kieffer v. Le Séminaire de Quebec, [1903] A. C. 85.

² Code Civil de Quebec, § 501. The clause relates to the liability of a landlord for the tort of a tenant in connection with the impairment of a riparian right.

³ Code Napoléon, § 640.

⁴ R. P. Pothier, *Traité de société* (Paris, 1774), 2 appx., 235-239.

⁵ *Corpus Juris Civilis* (ed. Krueger & Mommsen, 3 vols., Berlin, 1882-1883), vol. 1 (*Digesta*), Tit. 39, § 3 (de aqua, 6, 7).

⁶ James Bryce, *Studies in History and Jurisprudence* (London, 1901), 72.

is, however, entirely at variance with historical accuracy. It does not square with the facts that when the French came to Quebec their own law had not been romanized or that the first body of law which the French authorities introduced into Canada—the Custom of Paris—was about as free from the stamp of Roman influence as was the common law of England at the contemporary stage of its existence. It does not make clear to us, moreover, how it has come to pass that the Code Napoléon, a compilation prepared many years after Canada passed out of French hands, should have had many of its provisions embodied in the civil code of a British colony. The truth is that the territory which now forms the province of Quebec really began its legal history undominated by Roman influence. For a full century this influence, moreover, gained but little headway. When the colony passed into English hands, however, the romanizing of its legal system very soon began, and this has gone on more or less steadily under English auspices. For the dominance of Roman juridical ideas in the province at the present day the English authorities are mainly responsible. These ideas were not wholly a heritage from the French.

The Custom of Paris, which must form the starting-point in any outline of French-Canadian legal history was, at the outset, only one of the numerous bodies of local custom which regulated private relations in that portion of France, mainly the North, which was known as the *pays coutumiers* to distinguish it from that other portion of the kingdom, mainly the South, which was known as the *pays de droit écrit* and in which the written laws of Rome applied.¹ These various *coutumes*, or local bodies of customary law, were fundamentally the codified customs of the Teutonic Franks; in origin and in development they were as thoroughly Teutonic and as free from Roman influence as were the laws of Ine or Alfred the Great.² Unofficial codifications of the Custom of Paris were made as early as the thirteenth century; but the first authoritative redaction was not accomplished until 1510.³ The compilation prepared in this year is commonly known as the "old custom," and it was

¹ A map showing the two regions may be found in Jean Brissaud's *Manuel d'histoire du droit français* (Paris, 1904), 152.

² This almost entire freedom of the *coutumes* from Roman influence is discussed in Adhémar Esmein's chapter on "La coutume et le droit romain" in his *Histoire du droit français* (Paris, 1892), 673.

³ H. Buche, "Essai sur l'ancienne coutume de Paris aux XIII et XIV siècles" in *Nouvelle Revue Historique*, vol. viii. pp. 45-86; vol. ix. pp. 558-579.

with this as a basis that Dumoulin wrote his famous Latin commentary. This is to distinguish it from the "new custom" which embodied the results of a revision made in 1580 by a commission of Parisian lawyers under the presidency of the distinguished juriconsult Christofle de Thou.¹

In this revision of 1580 the general arrangement of the Custom of Paris was improved, and some changes were made in the text. The code now appears with its text arranged in sixteen titles which contain altogether three hundred and sixty-two articles numbered consecutively. The form is satisfactory and the various rules are set forth with tolerable clearness and brevity. The most distinguishing characteristic of this code, however, is its thoroughly native spirit; for it contains very little distinct trace of either Roman or Canon law influence. One might indeed go so far as to say that the jurisprudence of Rome had up to this time influenced the Custom of Paris no more than it had influenced the common law of England at the contemporary stage of its development. It ought to be mentioned, however, that the Custom of Paris did not purport to be a complete and comprehensive body of jurisprudence; for it did not include the general law of obligations nor the law of special contracts. All this, which forms an important part of every legal system, was left to be governed, even in the territory to which the Custom of Paris applied, mainly by the rules of Roman law. This latter obtained its foothold in the Viscounty and Provostship of Paris, not through the Custom, but through its application to a sphere of private relations with which the Custom did not undertake to deal. It is highly important that one should remember this, for it does not coincide with the commonly accepted idea that Roman law first made its way to the New World through the transplantation of the Custom of Paris to New France and Louisiana.² The Custom itself owed little or nothing to Roman law; and it consequently brought little or nothing of it across the seas.

In 1664, when all the territories of France in the Western Hemisphere were given to the Company of the West Indies, it seemed advisable that a definite code of jurisprudence for these territories should be prescribed, and from the many customary codes available for this purpose the Custom of Paris was selected and decreed into

¹ V. A. Poulenc, *La coutume de Paris* (Paris, 1900).

² See, for example, W. W. Howe's article on "Roman and Civil Law in America" in 16 *HARV. L. REV.* 343-358 (March, 1903).

force.¹ The French colonists in America up to this time had been drawn mainly from Normandy, and it has sometimes been suggested that the Custom of Normandy would have been a more appropriate choice as a colonial code. It is to be remembered, however, that the Custom of Paris had acquired a certain primacy among the various French *coutumes* at this time, and that even before this date Dumoulin had been able to speak of it as *caput omnium hujus regni et totius etiam Belgicae consuetudinum*.² At the time of its transplantation across the Atlantic it bade fair to become the "common law" of France, and its selection by the French authorities was therefore entirely logical, although it involved the application to sparsely settled and undeveloped colonies of what was intrinsically a metropolitan code.

By the decree of 1664 it was provided that the courts of the French colonies in America and the West Indies should govern themselves by the Custom of Paris and "by the laws and ordinances of the realm." The ordinances of the French crown prior to this date had been somewhat numerous, but few of them had made any important changes in the law of private relations. The age of Louis XIV (1662-1715) was prolific in royal legislation, however, and a succession of elaborate decrees, commonly known as the *grandes ordonnances*, revised and codified several important branches of law and civil procedure.³ This legislation in the main supplemented the Custom of Paris, and covered fields of law with which the Custom did not undertake to deal; but to some extent the great ordinances varied and altered in effect the provisions of this code. It therefore becomes important to know whether these ordinances extended to the colonies, or whether their provisions applied to France alone.

In France it was necessary, before an ordinance of this sort should become valid, that it should be registered by the Parliament of Paris. This body, as every one knows, had technically the

¹ "Seront les juges établis en tous les dits lieux tenus de juger suivant les loix et ordonnances du royaume, et les officiers de suivre et se conformer à la coutume de la prévôté et vicomté de Paris, suivant laquelle les habitans pourront contracter sans que l'on puisse introduire aucune coutume pour éviter la diversité." Établissement de la Compagnie des Indes Occidentales (Art. xxxiii), in Isambert's *Recueil général des anciennes lois françaises* (30 vols., Paris, 1822-1833), vol. xviii. pp. 38 ff.

² Paul Viollet, *Histoire du droit civil français* (Paris, 1893), p. 208.

³ Among these were the "Ordonnance civile touchant la réformation de la justice" (April, 1667), in Isambert's *Recueil général*, vol. xviii. pp. 103 ff.; the "Ordonnance de la marine" (August, 1681), in *Ibid.*, vol. xix. pp. 282 ff.; and the "Ordonnance du commerce" (March, 1673), in *Ibid.*, vol. xix. pp. 92 ff.

right to refuse registration, and thus to deny validity to royal decrees; but the king might, and as time went on did actually, override its veto by the use of the prerogative commonly known as the *lit de justice*. Now the Sovereign Councils, which the French government established in its American colonies, were modelled roughly after the frame of the Parliament of Paris, and in the edicts creating them were specifically instructed to follow the procedure of this body.¹ One of their chief functions, indeed, was that of receiving royal ordinances sent from France and of registering these in their council records. Might these colonial councils, then, like their prototype in France, refuse to register a royal decree; and might a royal ordinance become operative in the colonies save after such registration? The answer to the former of these questions is simple enough. Whatever the legal rights of the councils in Canada and Louisiana, the fact was that the councillors in both colonies were appointed directly by the king; they held office only during the royal pleasure; and they might be removed by the crown at will. Unlike the members of the Parliament of Paris, they did not secure their posts by purchase or by inheritance, and they had hence no security of tenure. At the first show of recalcitrancy Louis XIV would certainly have removed the colonial councillors from office. They themselves knew this very well, and there is consequently no evidence that they ever showed any disposition to refuse registration to any royal mandate sent to them.

The other question, namely, whether an ordinance which had been registered by the Parliament of Paris, but not sent out to be registered by the councils of the Franco-American colonies, could be held to apply in these colonies, is one which is by no means so easy to answer. As a matter of fact, the great ordinances of Louis XIV were not registered in any of the colonies. Still their provisions were commonly accepted by the colonial courts, and especially by the courts of Canada during the French régime, and some of them acquired the full force of law. There was a good deal of Roman law in these great ordinances, and it was in this way that some branches of Roman jurisprudence made their way to America and gained a footing there. The colonial courts followed the provisions of the great ordinances in many matters

¹ See the "Édit de création du conseil souverain de la Nouvelle-France" (April, 1663), in *Édits et ordonnances du roi concernant le Canada* (3 vols., Quebec, 1854), vol. i. pp. 37-39.

because they found it convenient to do so; it is now well settled that, since the ordinances were not registered in the colonies, they were in no way binding upon the colonial authorities.¹

But the royal ordinances were not the only enactments by which the Custom of Paris or "common law" of the colonies was supplemented or changed. The Sovereign Councils of the colonies might themselves issue decrees, and the ordinances issued by the council at Quebec fill several ponderous volumes.² Likewise the Intendant in New France and the Sub-delegate in Louisiana issued their multitude of *règlements* covering all sorts of matters from the most important to the most trivial, as the writer has elsewhere shown.³ Indeed, if there is any one feature which impresses the student of French administration in the New World, it is the prodigious official activity there displayed. Still this bewildering mass of colonial legislation did not greatly modify the general principles of colonial law as set forth in the Custom of Paris and in those of the royal ordinances which had been registered, for the obvious reason that the ordinance power of the colonial authorities was limited to the elucidation and interpretation of the law, and did not extend to the radical alteration of it. It is true, however, that they did not limit themselves strictly in this respect, but allowed themselves considerable latitude, for, as one of the intendants expressed it in a despatch to the king, there would soon be more lawsuits in the colony than persons, if the authorities did not hold themselves free to order things in a fashion which often involved wide departures from the letter of the law.⁴

When the French withdrew from their extensive territories in 1760, therefore, they left implanted in these a legal system which was fundamentally Teutonic in character, and which, except so far as the law of special contracts was concerned, bore very little important trace of Roman influence. The jurisprudence of the French colonies in America had been much less romanized than the jurisprudence of the motherland at this time; for many branches of the home jurisprudence had been thoroughly impregnated

¹ F. P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal, 1907), especially the cases cited on p. 4, note 3.

² *Jugements et délibérations du conseil souverain de la Nouvelle-France* (6 vols., Quebec, 1885-1891).

³ "The Office of Intendant in New France" in *American Historical Review*, October, 1906, pp. 15-38.

⁴ Raudot to Pontchartrain (November 10, 1707), in *Canadian Archives*, Series F., vol. xxvi. pp. 7 ff.

with Roman influences through the issue of the great ordinances which, as has been stated, were not registered in the American colonies of France, and were consequently not part of the legal systems there. Somewhat strange and paradoxical as it may appear, a large part of the Roman influence which now appears in the civil jurisprudence of Quebec and Louisiana made its way to these jurisdictions, not during the period of French dominion, but since the expulsion of France from the New World. This may be best illustrated, perhaps, by confining attention to the former of these two jurisdictions alone.

It is a recognized principle of English public law that the conquest of alien territory does not, *ipso facto*, involve the extension thereto of the English law of property and civil rights.¹ On the contrary, the law of the conquered territory remains in full force and effect until such time as the new suzerain may alter or abrogate it by explicit enactment. The conquest of Canada, therefore, left the colony with its old law for the time being. But this ancient jurisprudence was soon set aside, for within three years after the conquest, on October 7, 1763, a royal proclamation provided for the establishment of new courts in the colony and directed specifically that these tribunals should "hear all causes, both criminal and civil, as near as may be agreeable to the law and equity of England."²

The intent of this proclamation was without doubt to abrogate entirely the Custom of Paris and the other factors in the old law system of the province, replacing these by the common law and equity jurisprudence of England. But it is quite an open question whether the king of England, by the mere exercise of his royal prerogative and through the elementary agency of a royal proclamation, had power to make this sweeping change. There are those who believe that a change of this nature could be made only by Act of Parliament. The question is one which has been discussed at considerable length by the legal savants of French Canada, and until very recently the weight of opinion has inclined to the view that the king did not possess the right to abrogate the old law by proclamation.³ One of the higher courts of Quebec,

¹ The leading case on this point is *Campbell v. Hall*, 1 Cowp. 204.

² Canadian Archives, Series Q., Vol. 62A, Pt. I, pp. 114 ff. An exact copy of the proclamation is printed in "Documents relating to the Constitutional History of Canada" (ed. A. Shortt and A. G. Doughty, Ottawa, 1907), pp. 119-123.

³ Rudolphe Lemieux, *Les origines du droit franco-canadien* (Montreal, 1901), pp. 363 ff.

moreover, assumed this attitude in an important decision;¹ and in another significant case the chief justice argued convincingly in the same direction, although the determination of this point was not essential to the decision of the court.² But the most recent writer on the subject has concluded, after a discriminating review of the whole matter, that the king did have the power to abrogate the old law by proclamation, and that the proclamation of 1763 did legally abrogate the French jurisprudence in favor of the laws of England.³ I am convinced that this conclusion is entirely sound. The question is, however, one of academic rather than of practical interest, for the terms of the proclamation, in their original form, were never put into general operation.

Apart altogether from the question of legality there were important practical difficulties in the way of the change. For one thing it was immediately found that the new English law of real property could not be applied by the courts to the settlement of disputes concerning proprietary rights, for the obvious reason that this law dealt mainly with the principles and incidents of socage tenure, whereas the land tenures of Canada were at this time almost wholly feudal, and it was the intention of the English authorities, in compliance with pledges given at the time of the conquest, to leave the land tenure system untouched.⁴ As the new law was so clearly unadapted to the subject matters with which it had to deal, the governor of the colony instructed the courts to apply the old law to disputes concerning land until the home government could be consulted on the point. In 1766 the English authorities gave instructions that in "all suits and actions relative to the titles of land, and the descent, alienation, settlement, and encumbrance of real property the colonial courts do govern themselves in their proceedings, judgments, and decisions by the local customs and usages which have hitherto governed and prevailed within the province."⁵ The common law of England here received, so far as the new possessions in America were concerned, its first important set-back.

¹ *Stuart v. Bowman*, 2 L. C. Rep. 369 (1851).

² The judgment of Sir Louis H. Lafontaine in *Wilcox v. Wilcox*, 8 L. C. Rep. 34 (1857).

³ F. P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal, 1907), pp. 12-19.

⁴ This whole question of the relation of feudal tenures to the new legal system is discussed at length in the writer's "Seigniorial System in Canada" (New York, 1907), Chap. XI.

⁵ Instructions to the Hon. James Murray (June 24, 1766) in *Public Record Office, London, Board of Trade, Canada*, vol. xv.

It was soon to receive, however, a much more severe assault, for the courts promptly found difficulty in administering the two systems of law side by side. Considerable chaos resulted from the fact that the royal decrees, the colonial ordinances, and the decisions of the courts during the French régime were yet unpublished: they were still in manuscript, in a handwriting difficult to follow, unarranged, unindexed, and to some extent scattered. It was only natural, therefore, that the English judges should have, in most cases, given up any serious attempt to ascertain the old law, and should have resorted, for the determination of matters which came before them, either to the rules of English law relating to tenure in copyhold or to the rules of Roman law relating to tenure *en fief*. Recognizing the difficulties which confronted the courts in complying with the letter of their instructions, Governor Carleton appointed a "Select Committee of Canadian Gentlemen well skilled in the Laws of France and of that Province," to make a digest of the whole body of provincial jurisprudence as it had existed in the colony prior to the coming of the English. This codification was accomplished in 1773.¹ It is worth noting, however, that the committee allowed itself considerable leeway in its work; for while its task was specifically to make a digest of the laws which had actually governed private relations in the colony before 1760 it sought guidance for its arrangement of the abstracts, and to some extent guidance in interpretation, in the works of the standard French commentators of the period. These, as is well known, had written under the influence of a more or less thorough training in the Roman law, and they transmitted some of this influence to the Canadian codifiers. Some Roman law therefore worked its way into Quebec through the decisions of the courts in the period 1764-1774 and through the work of those who codified the ancient laws during the latter years of this decade.

In 1774 the provisions of the Quebec Act restored the old French

¹ It was published in four parts at London during the years 1772-1773. The exact titles of the four parts are: 1. An Abstract of those Parts of the Custom of the Viscounty and Provostship of Paris which were received and practiced in the Province of Quebec in the time of the French Government. 2. The Sequel to the Abstract . . . containing the Thirteen latter Titles of the said Abstract. 3. An Abstract of the Criminal Laws that were in force in the Province of Quebec in the time of the French Government. 4. An Abstract of the Several Royal Edicts, and Declarations, and Provincial Regulations and Ordinances that were in force in the Province of Quebec in the time of the French Government, and of the Commissions of the several Governors-General and Intendants of the said Province (London, 1772-1773).

law in "all cases relating to property and civil rights," thus ousting from the province all that was left of English law in its application to other than criminal causes.¹ This was a very welcome concession to the French-Canadians, and doubtless had some influence in keeping them from casting in their lot with the revolting American colonists to the southward. By these latter, as is well known, the change was regarded as a species of treason to Anglo-Saxon institutions, and in the Declaration of Independence George III was rebuked, *inter alia*, "for abolishing the free system of English law in a neighboring province." At any rate, the Quebec Act restored in its entirety the civil jurisprudence of the old régime, and it has remained in full force throughout the Province of Quebec down to the present day. The English criminal law has, however, existed side by side with it from the outset.

During the half century following the restoration of the old law system many changes were made in it; for the legislative authorities of the province had been given power to change it by enactment whenever changes might seem desirable. In 1785, for example, the provincial authorities made provision that in all commercial causes the English rules of evidence applicable to such proceedings were to be followed. These English rules of evidence in commercial causes were founded, however, on the rules of the old law merchant, and as they were in their origin rather international than national they did not differ in essentials from those which were prescribed in the Ordonnance de la Marine of 1681,² one of the Grand Ordinances which had never been registered in the colony. Other statutes made important changes in various branches of the law, and the abolition of the seigniorial system of land tenure in 1854 made a very radical change, not in the law itself but in one of the chief subjects with which the civil law had to deal. During this period, moreover, a considerable development took place through the agency of judicial decisions. The judges of the province turned constantly for enlightenment to the commentators of Old France, to the decisions of French courts, and, above all, to the provisions of the Code Napoléon after that compilation had been prepared. In many respects the provincial jurisprudence, therefore, while professing to be a perpetuation of the old legal system, was steadily departing from this latter. Through the channels

¹ 14 Geo. III. c. 83.

² This ordinance may be found in Isambert's *Recueil général*, vol. xix. pp. 282 ff.

which have just been mentioned the influence of Roman Law exerted itself strongly and with enduring effect.

In 1857 it was deemed advisable that the civil law system of the province should be revised and recodified, for there had been no important revision since 1773. The work was committed to a commission of French-Canadian jurists by whom it was accomplished with high credit. When the task was completed, the compilation was enacted as the *Code Civil de Québec*. If there was any one feature which marked the labors of this commission, it was the unremitting attention which they gave to the *Code Napoléon* and the large extent to which they drew from this source. In its arrangement the *Code Civil de Québec* follows the *Code Napoléon* almost slavishly. In matter the dependence is extensive and obvious. Many articles are reproduced verbatim; many others show only mere verbal transposition. With the exception of a single book,¹ indeed, the *Code Civil de Québec* may be much more properly looked upon as a recension of the *Code Napoléon* than as a revision and recodification of the French civil law as it had existed in the colony before the English conquest.

Now those who are familiar with the history of the legal system of modern France do not need to be reminded of the mighty debt which the *Code Napoléon* owes to the Roman Law. This obligation, direct and indirect, is made perfectly clear in the collection of sources which the Bonapartist compilers used in the consummation of their monumental task.² The legal system of France had been steadily romanized during the century preceding the Revolution, and the compilers of the *Code Napoléon* completed the process. It may not be amiss therefore to point out that the *Code Civil de Québec*, in so far as it is based upon the Napoleonic compilation, shares equally in indebtedness to the jurisprudence of Justinian. It is probably well within the bounds of truth to suggest that more Roman law found its way into the contemporary legal system of French Canada by way of the *Code Napoléon* than through any other channel, or, possibly, through all other channels combined.

The dominance of Roman juridical ideas in this province is not, therefore, a heritage from the days of French possession. It is not because the French established there the Custom of Paris; but

¹ Book IV.

² These sources are brought together in Fenet's *Recueil complet des travaux préparatoires du Code Civil* (15 vols., Paris, 1827-1829).

because under English rule there have been wide departures from this original code. When the French left Canada in 1763, they left behind them a system of jurisprudence which probably owed more to Teutonic than to Roman sources. It is of course not unnatural that, being French in origin, the law system of the province should have continued French in development despite the passing of the colony into the hands of a new suzerain and notwithstanding the startling break in the continuity of French legal evolution which marked the Revolutionary and Napoleonic periods. But it was not essential that the civil jurisprudence of Quebec should have taken this course. In fact it was the intention of the English authorities at the outset to turn it into quite another channel. From this policy they eventually refrained, however, and by so doing gave recognition to the principle that, in the evolution of a legal system, ethnic factors are apt to prove more potent than the pressure of political control.

William Bennett Munro.

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THE RELATION OF THE MAJORITY STOCKHOLDERS TO THE CORPORATION. — The fiduciary relation to the corporation of its officers and agents is well established. How far stockholders are in a similar position is as yet a subject of conflicting opinion. As between himself and other shareholders, or the corporation, it is clear that a mere stockholder is not a fiduciary.¹ When, however, he combines with others to form a majority, his dealings with the corporation are subjected to severe scrutiny.²

If the majority act for themselves, without the help of their powers as majority, they are free to deal at arm's length with the corporation.³ Hence they may buy in corporate property at a public sale, even if the consideration is inadequate.⁴ But when they use their power of control to affect the corporate business or property, it must be recognized they owe a certain duty to the corporation. Because of this and of the hard cases which sometimes arise, the courts, in their natural desire to redress admitted wrongs, have been led to declare that the majority sustain a fiduciary capacity.⁵ This is a convenient but strained analogy. It is scarcely compatible with the recognized right of the majority to control the affairs of the corporation, not as a delegated but as a principal power.⁶ And it is conceded that

¹ Hanchett v. Blair, 100 Fed. 817.

² Of course equity should not interfere with the legal rights of the majority to determine ordinary questions of internal management. Foss v. Harbottle, 2 Hare 461.

³ Russell v. Rock Run, etc., Co., 184 Pa. 102.

⁴ See Price v. Holcomb, 89 Iowa 123; Rothchild v. Memphis, etc., R. R. Co., 113 Fed. 476, 480; 7 Thompson, Corp., §§ 8601 et seq.

⁵ Miner v. Belle Isle Ice Co., 93 Mich. 97, 116; Bias v. Atkinson, 63 S. E. 395 (W. Va.); 9 Colum. L. Rev. 357. It is often said that the relation is that of a "quasi-trust," or "quasi-fiduciary." 1 Beach, Corp., § 70. But no court has as yet satisfactorily defined the meaning of either phrase.

⁶ Cf. Price v. Holcomb, *supra*. Contra, Meeker v. Winthrop Iron Co., 17 Fed. 48.

a sale of the corporation's property, voted to themselves by the majority, is valid if the price is fair,⁷ whereas a sale by a fiduciary to himself is voidable irrespective of the adequacy of the consideration.⁸ But obviously the majority should not be allowed to seriously impair the rights or imperil the undertaking of the corporation: equity will not permit them to appropriate the corporate assets at the expense of the minority,⁹ or to wreck the corporation.¹⁰ The sound doctrine on which these cases may be rested is the same that restrains a life tenant without impeachment from committing equitable waste—equity prevents the unconscionable use of a legal right where it threatens irreparable harm.¹¹ A recognition of this basis, it is believed, would obviate many strained analogies to a fiduciary relation that cannot fairly be said to exist,¹² and result in a more uniform understanding of the true situation.

Many cases arise from profits made by the majority at the expense of the corporation through a dummy board of directors. If the majority stock is acquired by a competing corporation which elects its own directors,¹³ and through them conducts operations detrimental to its rival, the minority are given relief.¹⁴ The directors owe strict fiduciary duties, and such a confederation to work for the interests of the majority as apart from those of the corporation is in the nature of a conspiracy in breach of trust.¹⁵ Theoretically this principle seems to extend to all cases of improper influence, and, if so interpreted, would remedy the more pronounced evils of corporate manipulation, without impairing the legitimate use of their rights by the majority.¹⁶ As a matter of practice the difficulty of determining what did influence the directors in their action has prevented full recognition of the rule, leaving the courts in most cases to fall back on the principles applied where the majority profit by transactions that involve no breach of trust.¹⁷ But in a recent case where the majority bought up at discount outstanding claims against the corporation, recovery on them was reduced to the amount of the actual purchase price, on the intervention of minority stockholders, because the former had prevented the corporation, by their control of the directors, from itself accepting an opportunity to buy the claims at dis-

⁷ Rio Grande Ry. Co. v. Armendiaz, 5 Tex. Civ. App. 449.

⁸ Newcomb v. Brooks, 16 W. Va. 32. Unless the beneficiaries consent. Gorder v. Plattsmouth Canning Co., 36 Neb. 548.

⁹ Menier v. Hooper's Tel. Works, 9 Ch. App. 350; 2 Bigelow, Frauds, 645.

¹⁰ De Neufville v. N. Y. & N. Ry. Co., 81 Fed. 10.

¹¹ No authority has been found expressly saying this. But it is submitted to be the true solution and the one which many courts have unconsciously used as the basis of the equitable jurisdiction.

¹² It is said that by assuming control the majority shoulder the duty of the corporation to its shareholders, and are therefore fiduciaries. Rothchild v. Memphis, etc., R. Co., *supra*. But the obligation is not that of a trust or agency, since the right of reimbursement would end limited liability. It is simply that of corporation and stockholder, but that the majority assume it by taking control implies that the corporation is the majority. The majority always control, and have the right to control from the nature of the enterprise.

¹³ This it has the right to do. Jones v. Green, 129 Mich. 203.

¹⁴ Mumford v. Ecuador Development Co., 111 Fed. 639.

¹⁵ 1 Morawetz, Priv. Corp., 2 ed., § 529. See Rogers v. N. C. & St. L. Ry. Co., 91 Fed. 299, 312-314.

¹⁶ Any attempt by the majority to ratify their unconscionable conduct would seem a proper case for drawing the veil to prevent the fraud. Cf. Woodroof v. Howes, 88 Cal. 184. But see Beatty v. N. W. Transp. Co., 12 App. Cas. 589.

¹⁷ Jones v. Green, *supra*; Ervin v. Ore. Ry. & Nav. Co., 20 Fed. 577, 27 Fed. 625.

count.¹⁸ *Young v. Columbia Land, etc., Co.*, 99 Pac. 936 (Ore.). The result upholds what seems the better doctrine despite the difficulties of its application.¹⁹

THE EFFECT OF NON-COMPLIANCE BY A FOREIGN CORPORATION WITH LOCAL STATUTORY REQUIREMENTS. — The dictum of Chief Justice Taney in *Bank of Augusta v. Earle*¹ that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created," is the basis of the law of foreign corporations in this country. Thus a corporation is foreign in every state except that of incorporation, and is never present even where it conducts a foreign business. This principle, which results from emphasizing the fictitious nature of the corporation, has been rigidly followed despite actual conditions; even, for instance, when the foreign incorporation was effected for the very purpose of doing business in another state and by citizens of that state.² Equally well settled is the law that a state may exclude a foreign corporation from transacting business within its territory,³ and *a fortiori* that a state may impose terms and conditions upon which alone business may be conducted therein.⁴ But a foreign corporation may actually transact business without compliance or after merely partial compliance with the state laws: the problem then arises as to what rights may be predicated on such unauthorized action.

Many state statutes are explicit as to the results of non-compliance by the foreign corporation, and a strict construction of these statutes leaves little for judicial decision.⁵ Thus an Oregon statute requiring a declaration of purpose, payment of fee, and appointment of an agent to accept service expressly declares that a foreign corporation shall not transact business, and cannot bring suit in the state or federal courts until these terms have been complied with. Under this enactment it was recently held that a foreign corporation neglecting to comply with these provisions could not recover on a contract made within the state. *Cyclone Mining Co. v. Baker Light & Power Co.*, 165 Fed. 996 (Circ. Ct., D. Ore.). In view of the express language of the statute the court refused to accede to the contention that the defendant was estopped to show the lack of compliance.⁶

Many statutes, however, are silent as to the results of non-compliance; and as to what rights a guilty foreign corporation may assert under such a statute the authorities appear to be irreconcilable; for the courts have frequently failed to base their decisions on any fundamental proposition of law applicable to the situation. Such a case resolves itself into the assertion of corpo-

¹⁸ Some of the plaintiffs were also directors, but it does not appear that all were.

¹⁹ *Woodroof v. Howes*, *supra*; *Pearson v. Concord R. R. Co.*, 13 Am. & Eng. R. R. Cas. 94, 102; *Thompson v. Meissner*, 108 Ill. 359.

¹ 13 Pet. (U. S.) 519.

² *Demarest v. Flack*, 128 N. Y. 205. Foreign corporations have been held present for purposes of taxation and service of process. See *Southern Cotton Oil Co. v. Wemple*, 44 Fed. 24; *St. Clair v. Cox*, 106 U. S. 350, 355; 6 *Thompson, Corps.*, § 7994.

³ *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

⁴ *Paul v. Virginia*, 8 Wall. (U. S.) 168.

⁵ In this connection it must be noted that even when the contracts of a foreign corporation are expressly declared void, the courts have unanimously held that the corporation must discharge the contractual obligation attempted to be entered into. *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85.

⁶ *Cf. Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893.

rate privileges by a group of individuals without legal sanction : in other words, the question is one of unauthorized corporate action.⁷ And in dealing with the situation the analogy to the unauthorized action of domestic *de facto* corporations suggests itself. It is submitted that the analogy is close, and that the two questions should be similarly treated. In each case the state is interested in protecting its citizens in dealing with corporations. In each case considerations of fairness between the parties should be balanced against the policy of collateral attack to supplement direct attack by the state.⁸ And in each case emphasis should be laid on whether or not an attempt has been made to comply with the law. Thus, by what is believed to be the better law, where such an attempt has been made, the foreign corporation is not refused relief for an invasion of its property rights.⁹ Nor is the corporation to be regarded as a trespasser precluded from showing the contributory negligence of the plaintiff in a tort action.¹⁰ Again validity is given to a conveyance of land by the foreign corporation,¹¹ and a party who has received the benefits of a contract with a foreign corporation is denied the right to collaterally attack its non-compliance with the statutory provisions.¹² But as a drastic check upon total disregard of the law by the foreign corporation, full liability is imposed on the associates, and the foreign incorporation is not recognized.¹³ These decisions are strikingly similar to those accorded the unauthorized action of domestic *de facto* corporations,¹⁴ and indicate a proper tendency to treat foreign and *de facto* corporations with equal tolerance.

THE STOCKHOLDER'S REMEDY FOR AN INJURY TO HIS CORPORATION OR TO HIMSELF. — A corporation owes a contractual duty to each shareholder to act within its authorized powers and manage the corporate property in a businesslike manner for the benefit of all concerned. That a stockholder, either by way of specific performance of this contractual liability or in protecting his property rights, may enforce these obligations and obtain redress for their violation is axiomatic. The difficulties involved here pertain not to the right itself but to the remedy. For the wrong to be redressed may result not only from the misconduct of the corporation, but from that of either its officers, the majority stockholders, or outsiders. And the conception of the corporation as a person distinct from the stockholders leads the law to regard a wrong to the corporation as one which the corporation alone can redress, even though a stockholder is, as he must be, damaged by the same wrong.¹ The latter's right is against the corporation, to force it to perform the obligation, which it owes to every stockholder, to redress the wrong.

⁷ In any particular jurisdiction, then, the immediate problem is to discover the general attitude of the state, whether hostile or tolerant towards unauthorized corporate action.

⁸ A state may bring *quo warranto* to oust a foreign corporation. *State v. Boston, etc., Ry. Co.*, 25 Vt. 433.

⁹ *Jordan v. Western Union Tel. Co.*, 69 Kan. 140.

¹⁰ *Bischoff v. Automobile Touring Co.*, 97 N. Y. App. Div. 17.

¹¹ *Fritts v. Palmer*, 132 U. S. 282.

¹² *Washburn Mill Co. v. Bartlett*, 3 N. D. 138. *Contra, In re Comstock*, Fed. Cas., No. 3078.

¹³ *Hill v. Beach*, 12 N. J. Eq. 31.

¹⁴ See 20 HARV. L. REV. 456; 21 *ibid.* 305.

¹ *Smith v. Hurd*, 12 Met. (Mass.) 371.

The remedy then is derivative, and this despite the obvious fact that there is actually a direct injury to the stockholder's interest. For this sort of injury, however, the law does not afford the stockholder a direct personal action against the guilty outsider.²

On the other hand, the interest of one stockholder alone may be so peculiarly affected by a breach of the corporation's obligations that his remedy will be personal and direct. Thus he may force the corporation to permit an inspection of the books and records,³ to pay declared dividends,⁴ and to allow subscription to a proportionate share of new issues of stock.⁵ And the undertaking of an *ultra vires* act may be enjoined.⁶ In these cases a shareholder's bill is obviously unwarranted; for the issue is primarily between the corporation and the particular stockholder, and the corporation cannot, of course, be plaintiff and defendant in the same proceeding.

This distinction between the direct remedy and the remedy derived from the right of the corporation itself is important because of the insistence with which the law has differentiated the two. Indeed a joinder of an individual claim together with a shareholder's bill renders the bill multifarious.⁷ That the distinction is fundamental is seen in the incidents of the two forms of action. Obviously in the stockholder's personal action particular damage is a necessary allegation, whereas in a shareholder's bill an allegation of such damage is considered irrelevant.⁸ Moreover, in a shareholder's bill it is necessary to show the refusal of the corporation to act,⁹ unless a demand to this effect would be unavailing.¹⁰ Again the act complained of must usually be beyond the powers of the officers and of the majority stockholders;¹¹ for it is not the purpose of the law to assail, at the instance of disgruntled stockholders, the reasonable discretion of those in control of the corporation. And since the bill is based on the right of the corporation all defenses against the corporation are pertinent,¹² as, for instance, that the corporation has been enjoined from proceedings,¹³ or that a similar shareholder's bill has been adjudicated.¹⁴ Similar suits by other stockholders, however, in no way affect the direct and personal action.

Theoretically clear the distinction here is often difficult of application, but as a practical test it is submitted that a situation necessarily presenting not only the rights of a stockholder and the corporation but also those of third parties calls for a shareholder's bill.¹⁵ In this connection third parties

² *Converse v. United Shoe Machinery Co.*, 185 Mass. 422.

³ *Guthrie v. Harkness*, 199 U. S. 148.

⁴ *Jermain v. Lake Shore & M. S. Ry. Co.*, 91 N. Y. 483.

⁵ *Stokes v. Continental Trust Co.*, 186 N. Y. 285.

⁶ *Tomkinson v. S. E. Ry. Co.*, 35 Ch. D. 675. Cf. note 15, *post*.

⁷ *Searles v. Gebbie*, 115 N. Y. App. Div. 778. Though nominally the corporation is made defendant, it is simply the consolidation of two suits, and the suit is determined on the basis that the corporation is plaintiff.

⁸ *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121. Cf. *Tyree v. Bingham*, 100 Mo. 451.

⁹ *Greaves v. Gouge*, 69 N. Y. 154; *Rathbone v. Gas Co.*, 31 W. Va. 798.

¹⁰ *Brewer v. Boston Theatre*, 104 Mass. 378.

¹¹ *Hawes v. Oakland*, 104 U. S. 450; *Foss v. Harbottle*, 2 Hare 461. Cf. *Groel v. United Electric Co.*, 70 N. J. Eq. 616; *Dodge v. Woolsey*, 18 How. (U. S.) 331.

¹² *Kessler v. Ensley Co.*, 123 Fed. 546, 550; 148 Fed. 1019.

¹³ See *Smith v. Bulkley*, 18 Colo. App. 227.

¹⁴ *Memphis, etc., R. R. Co. v. Greyson*, 88 Ala. 572.

¹⁵ Thus a stockholder may directly enjoin the undertaking of an *ultra vires* act, *Tomkinson v. South Eastern Ry. Co.*, *supra*; but if he seeks to set aside an executed *ultra vires* transaction he must move through the corporation. *Hulton v. Bancroft*,

may consist of corporation officers or majority stockholders. Thus in a recent case one corporation, to prevent competition, secured control of another and so managed it as to render its stock worthless. A direct action by a stockholder of the latter corporation against the controlling corporation was held demurrable. *Ames v. American Telephone & Telegraph Co.*, 166 Fed. 820 (Circ. Ct., D. Mass.).

INJUNCTIONS AGAINST PRIVATE NUISANCES. — Against a continuing nuisance by a private individual or corporation equity will grant an injunction in favor of an innocent plaintiff who would otherwise suffer irreparable injury. As additional reasons for equity jurisdiction, desire to prevent multiplicity of suits and recognition of the inadequacy of the plaintiff's remedy at law are commonly mentioned.¹ Neither, however, is important; for equity will enjoin the commission of a single tort as readily as a nuisance where irreparable injury is threatened;² and as for the inadequacy of the remedy at law, that is obviously an element of the nature of the threatened injury. Irreparable injury in this connection may be defined as injury which is not only continuous but cumulative in effect, assuring in due time either such damage to the plaintiff as to personally disable him from the beneficial use of his property, or the destruction of that beneficial use itself.³ On the other hand, injury not irreparable, occasioned by a private nuisance, is not cumulative: its effect is to cause and maintain a definite deterioration in the beneficial use of the plaintiff's property, which may be felt either continuously or periodically in the same degree. Where injury of the latter class is threatened, it is said that equity will assume jurisdiction on the joint ground that the plaintiff's remedy at law is inadequate, and that he will otherwise be driven to a multiplicity of suits at law.⁴ But the very need of this multiplicity for redress at law amounts in itself to inadequacy. Equity jurisdiction should not depend on whether or not damages as computed by a jury can accurately enough measure the plaintiff's injury: in each such action he will obtain the only kind of redress possible either at law or in equity for a *past* wrong of this nature. The true ground is not that the law is inadequate⁵ within its sphere, but that, since the law can deal with the situation only as it breaks off into a sequence of separate torts, it is better that equity should grant single relief by dealing with it while there is still, so to speak, a single issue.

Where the plaintiff is entirely innocent,⁶ may equity ever justifiably refuse to take jurisdiction in this class of cases as in trespass? For as equity takes

& Sons Co., 83 Fed. 17. It must be recognized that cases may arise involving both rights; so that either form of action is appropriate. *Ritchie v. McMullen*, 79 Fed. 522.

¹ *American Smelting & Refining Co. v. Godfrey*, 158 Fed. 225.

² *Echelkamp v. Schrader*, 45 Mo. 505.

³ *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540.

⁴ 2 Story, Eq. Jur., 13 ed., § 925.

⁵ A distinction should be taken between difficulty of computing damages due to the nature of the injury and the character of the tribunal, and the impossibility of recovering the damages assessed because of the defendant's insolvency, which is in itself often considered a ground for equitable jurisdiction. *Reyburn v. Sawyer*, 135 N. C. 328, 340.

⁶ If the plaintiff, actively or by acquiescence, encouraged the defendant to make expenditures, equity will not hesitate to decline jurisdiction. See *Stock v. City of Hillsdale*, 119 N. W. 435 (acquiescence).

jurisdiction of the so-called equitable tort of waste on the theory that the law ought to have allowed a remedy therefor,⁷ so, conversely, where the defendant threatens repeated trespass which would cause a purely technical or nominal injury to the plaintiff equity will refuse an injunction on the theory that the law should not have granted a remedy in the first instance.⁸ But the very definition of nuisance postulates an injury which shall be substantial.⁹ Therefore it would seem that equity cannot rightfully refuse to exercise concurrent jurisdiction. Upon this question, however, the cases are in conflict. The weight of English authority and some of the courts in this country insist that the injunction must issue as a matter of right.¹⁰ Others, representing the modern trend, agree with a recent decision in refusing an injunction where the injury to the defendant by its issue would greatly outweigh the injury to the plaintiff by its refusal. *Bliss v. Anaconda Copper Mining Co.*, 167 Fed. 342 (Circ. Ct., D. Mont.). Doubtless otherwise the plaintiff may be enabled to charge an exorbitant price for his property. That, however, is one of the legitimate incidents of ownership;¹¹ but the same cannot be said for the private right of eminent domain which the defendant would in effect acquire upon a denial of the injunction.¹²

Although this doctrine of the "balance of convenience" is not to be justified upon strict principle, its persistence in this country and not in England may possibly be explained by the fact that the American courts, unlike the English, are not only denied the reassuring thought that the legislature is at liberty to take a higher view of the relative rights of the parties and condemn private property for private use,¹³ but are also, as a general thing, refused statutory authorization to give damages in lieu of an injunction.¹⁴

THE RUNNING OF THE BURDENS OF COVENANTS AT LAW AND IN EQUITY. — In England the burden of covenants runs with the land at law only in the case of leases.¹ In this country a broader view has been taken, and it is generally held that the burden will always run at law, provided,

⁷ See *Short v. Piper*, 4 Harr. (Del.) 181.

⁸ See *Behrens v. Richards*, [1905] 2 Ch. 614. Of course, if the law allowed no action for such trespass, no prescriptive right could be acquired. As it is, the plaintiff need only bring action often enough to defeat the presumption of a lost grant; and this, apparently, was not considered hardship enough, in the case cited, to compel equitable relief.

⁹ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642.

¹⁰ *Hennessy v. Cormony*, 50 N. J. E. 616.

¹¹ *Cowper v. Laidler*, [1903], 2 Ch. 337.

¹² Where the defendant is a public service corporation, the argument for granting the injunction is even stronger, for such corporations are allowed a statutory method of condemning private property. *Village of Dwight v. Hayes*, 150 Ill. 273.

¹³ *Cf. Goodson v. Richardson*, L. R. 9 Ch. App. 221.

¹⁴ But the English courts of equity will not avail themselves of this privilege, where irreparable damage is threatened. *Swaine v. Great Northern Ry. Co.*, 4 DeG., J. & S. 211. Without such statutory authorization the New York courts have assumed a like power by granting an alternative decree. *Sperb v. Metropolitan Elevated R. Co.*, 137 N. Y. 155. Such a course would be anomalous in the case of a private corporation; but when applied, as is done, exclusively in cases of public service corporations, the result is fantastic.

¹ *Haywood v. Building Soc.*, 8 Q. B. D. 403; *Austerberry v. Oldham*, 29 Ch. D. 750.

first, that there is privity of estate, and, second, that the covenant concerns the user or affects the enjoyment or the value of the land.² The great difficulty in the subject lies in the definition of privity of estate. Generally, however, the American law finds no privity unless the covenant accompanies a grant.³ This fulfills the obvious purpose of both requirements, to avoid the attachment to the land of mere personal covenants by excluding the covenants of strangers. In a recent Indiana case a covenant to repair a crossing was made on the assertion of a franchise right from the legislature to cross the covenantee's right of way. Although there was no actual grant by the covenantee, yet, since the necessity of one was avoided by the legislature and since the covenant was made on the first assertion of the legislative authority which dispensed with the necessity of the grant, it is difficult to agree with the court that there was no privity of estate. *Evansville, etc., Co. v. Evansville Belt Ry. Co.*, 87 N. E. 21.

In the United States the burden of all covenants that run at law will also run in equity, if the nature of the covenant allows, under the ordinary rules of specific performance.⁴ In England, where no burdens but those in leases run at law, equity steps in, but confines its relief to restrictive covenants.⁵ The ground of equity jurisdiction in such cases has been said to be the prevention of unjust enrichment: the successor of the covenantor by buying land subject to a burden buys at a lower price, and if he holds the land after purchase free from the burden, he is enriched by the enhancement in its value.⁶ A difficulty arises, however, in supposing that a covenantor properly advised as to the running of the covenant after his transfer would sell for the value with burden affixed. In other words, the theory presupposes its conclusion that the covenant will run. It is submitted that the jurisdiction of equity rests really on the old principle of the inadequacy of the legal remedy: equity thought the covenants should run as a matter of fairness and therefore enforced them by the application of the ordinary rules of specific performance in charging the consciences of successors taking with notice.

But on any theory of equitable jurisdiction it is difficult to see why there should be any distinction taken between negative and affirmative covenants; and the tendency of American courts is against such a distinction.⁷ The unjust enrichment exists whether the burden be affirmative or negative. That the expenditure of money by the covenantor's assign in specific performance may be unprofitable is a possible reason for non-enforcement on account of hardship or unfairness, but should not in itself prevent the existence of the right. Also it is well recognized in both England and America that equity will in many circumstances specifically enforce affirmative action

² *Gilmer v. Mobile, etc., Co.*, 79 Ala. 569, 572; *Bronson v. Coffin*, 108 Mass. 175.

³ *Sims, Covenants*, 197. *Cf. Barringer v. Va. Trust Co.*, 132 N. C. 409. It is as yet undecided whether there is privity of estate where the grantor parts with all his land and it is impossible to construe the covenant as the retention of an easement or profit. The nearest cases are covenants which are contained in grants of easements, when the covenants are allowed to run. Should such covenants not run, a third requirement would be added, that the covenant support some interest retained by the grantor.

⁴ *Sims, Covenants*, 255.

⁵ *Haywood v. Building Soc.*, *supra*.

⁶ 17 HARV. L. REV. 176; 18 *ibid.* 214.

⁷ See cases cited in 17 HARV. L. REV. 176, n. 3; *Farmers', etc., Co. v. N. H. Co.*, 40 Colo. 467, 478; *Flege v. Covington, etc., Co.*, 122 Ky. 348; *Atlanta Ry. Co. v. McKinney*, 124 Ga. 929.

where the performance required is not of too complicated a nature. Accordingly this hard and fast distinction between affirmative and negative covenants seems anomalous.

CONCURRENT JURISDICTION OF STATES OVER BOUNDARY WATERS.—Where a body of water is the boundary between two nations or states, there may arise many nice questions of jurisdiction because of the necessity to determine the exact place of occurrence of an act committed thereon. Especially difficult are these questions when, as is so often the case in this country, the boundary line is the main channel of a navigable river. The colonies regulated this situation by agreeing that each state should possess concurrent jurisdiction over the boundary river.¹ This solution was adopted at the formation of the Union and incorporated by Congress in the enabling acts of new states whose boundaries presented the problem.² By this grant of concurrent jurisdiction each state extends its jurisdiction into the territory of the other state, which at the same time retains its own jurisdiction. Jurisdiction is power to apply law to the acts of men,³ and by the common law is determined territorially. Logically, a state may extend its jurisdiction over acts committed beyond its territory, or, retaining its territorial sovereignty, grant jurisdiction over acts within its territory.⁴ But the combination of these possibilities is not free from difficulty. There are four possible conditions and interpretations of this concurrent jurisdiction: (1) That before jurisdiction is exercised both states must agree; (2) that one state can exercise jurisdiction within the other's territory so long as the other has not acted adversely; (3) that conflicting legislative enactments may exist, but the first state obtaining actual custody over the party or parties in question shall defeat the right of the other state to exercise its powers;⁵ (4) that a conflict of legislative, executive, or judicial decrees must be settled, if at all, by agreement between the conflicting jurisdictions after jurisdiction has been exercised.

The Supreme Court, having recognized the possibility of concurrent jurisdiction,⁶ had in a recent case to consider its scope. The boundary between Washington and Oregon is the main channel of the Columbia River, and an act of Congress gave the two states concurrent jurisdiction

¹ See *Handly's Lessee v. Anthony*, 5 Wheat. (U. S.) 374. Another form of agreement was the restricted concurrent jurisdiction maintained between Pennsylvania and New Jersey. See *Commonwealth v. Frazer*, 2 Phila. 191; *Attorney-General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 1.

² This solution was generally adopted. See *State of Missouri v. Metcalf*, 65 Mo. App. 681; *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 261. New York and New Jersey made an agreement without action by Congress, the constitutionality of which may be questioned. See *People v. Central R. R. Co. of New Jersey*, 42 N. Y. 283.

³ See *Wedding v. Meyler*, 192 U. S. 573, 584. The distinction between jurisdiction and sovereignty is brought out by the fact that in no case has one state been allowed to tax the property of the other on or over the river. *Dunlieth & Dubuque Bridge Co. v. County of Dubuque*, 55 Ia. 558; *Keokuk & Hamilton Bridge Co. v. People*, 145 Ill. 596; *Hamilton Bridge Co. v. Henderson City*, 173 U. S. 592.

⁴ *Holland, Jurisprudence*, 9 ed., chap. XVIII.

⁵ This was the agreement between Pennsylvania and New Jersey. *Commonwealth v. Shaw*, 8 Pa. Dist. Rep. 509.

⁶ *Wedding v. Meyler*, *supra*. Other courts have enforced this jurisdiction without considering its scope. *State v. Plants*, 25 W. Va 119; *Swearingen & Coriel v. Steamboat Lynx*, 13 Mo. 519.

over acts committed on the river. A Washington citizen licensed by Washington to fish with a purse net was convicted, in an Oregon court, of fishing with such a net on the Washington side of the river, in violation of an Oregon statute prohibiting such fishing in the Columbia River. The court held that the Oregon court did not have jurisdiction over the act in question. *Nielsen v. Oregon*, 212 U. S. 315. Thus the court restricted itself to the first two possible interpretations of concurrent jurisdiction, but left the final determination open. The lower federal courts have adopted the first idea, of a joint action,⁷ which, although possible, is a narrow and cumbersome interpretation. It is submitted that the second construction adopted by the majority of the state courts⁸ is the better. Joint action is unnecessary: each state retains its sovereign right to control acts within its territory; and it is only when there has been no expression of sovereignty by adverse legislation that the foreign state may also exercise jurisdiction therein.

The scope of the jurisdiction depends also on the kind of act committed. Early views⁹ restricting this grant of concurrent jurisdiction over rivers to acts affecting commerce have not been followed.¹⁰ But the jurisdiction has been uniformly held not to apply to acts affecting property, either affixed to the soil under the river¹¹ or to the river banks.¹² This exemption of property¹³ could be extended to cover all property not actually on the river and has been held to include the regulation of fishing rights.¹⁴ This seems erroneous; for the acts of fishing and shooting on a stream are uncertain of location, and the jurisdiction is created to obviate just such a difficulty. As to place, the jurisdiction is limited to acts on the river; although offenses on permanent bridges¹⁵ and on vessels temporarily aground¹⁶ are regarded as within its scope. So, by this interpretation of concurrent jurisdiction, courts have found a basis for determining the perplexing cases that may arise on boundary rivers. A simpler way of dealing with the entire question would be for one state to grant to the other exclusive jurisdiction over the whole river.¹⁷

INJUNCTIONS AGAINST THE ENFORCEMENT OF JUDGMENTS OBTAINED BY PERJURY. — Although at first jealously resisted,¹ the power of equity courts to enjoin the enforcement of judgments at law has, since the famous clash

⁷ *In re Matteson*, 69 Fed. 535; *Ex parte Deseiro*, 152 Fed. 1004. See *The Annie M. Smull*, 2 Sawyer (Fed.) 226.

⁸ *J. S. Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62; *McFall v. Commonwealth*, 2 Met. (Ky.) 395; *Wiggins Ferry Co. v. Reddig*, *supra*; *Memphis & Cincinnati Packet Co. v. Pikey*, 142 Ind. 304; *Church v. Chambers*, 3 Dana (Ky.) 274. See *State v. Faudre*, 54 W. Va. 122.

⁹ See *Buck v. Ellenbolt*, 84 Ia. 395; *State v. George*, 60 Minn. 503.

¹⁰ *Wedding v. Meyler*, *supra*; *McFall v. Commonwealth*, *supra*; *Dugan v. Indiana*, 125 Ind. 130.

¹¹ *Garner's Case*, 3 Gratt. (Va.) 654. See *Buck v. Ellenbolt*, *supra*.

¹² *Gilbert v. The Moline Water Power & Mfg. Co.*, 19 Ia. 319; *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black (U. S.) 485; *Attorney-General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 1.

¹³ This view has been expressly adopted by the Supreme Court. See *Wedding v. Meyler*, *supra*.

¹⁴ *Roberts v. Fullerton*, 117 Wis. 222.

¹⁵ *State v. George*, *supra*; *Comm. v. Shaw*, 8 Pa. Dist. Rep. 509.

¹⁶ *State of Iowa v. Mullen*, 35 Ia. 199.

¹⁷ This is the agreement between New York and New Jersey. See note 2, *ante*, and also *Ferguson v. Ross*, 126 N. Y. 459.

¹ *Heath v. Ryley*, Cro. Jac. 335.

between Lord Coke and Lord Ellesmere,² been firmly established. It is a rule of law that judgments are conclusive between the parties in matters that were or might have been urged.³ But this rule does not apply where the facts clearly show, either that the defeated party was unable to present his defense in the determination because the court was incompetent to hear it, or that without fault on his part he was prevented from presenting it through accident or fraud.⁴ Accordingly, if a defense, owing to its equitable nature could not have been pleaded,⁵ or if because of sickness⁶ or ignorance⁷ the defeated party could not appear, equity will enjoin the enforcement of the judgment. As to what constitutes such fraud as to justify equitable interference the authorities are in conflict. The great majority, however, require that the fraud shall be extrinsic and collateral, and not relative to an issue tried in the court of law.⁸ So perjury, however clearly established,⁹ is generally considered no ground for equitable relief, since it is related to matters involved in the consideration of the merits, and therefore intrinsic.¹⁰ A recent decision upholds the minority view that perjury will vitiate a judgment obtained against one free from negligence in the determination.¹¹ *Boring v. Ott*, 119 N. W. 865 (Wis.).

The reason that equity relieves against judgments secured through accident or fraud is to prevent the retention of an advantage unfairly or unconscionably gained.¹² Assuming that the injured party was not guilty of laches, the same reason applies to intrinsic as well as extrinsic fraud, and hence to perjury.¹³ Two main objections urged against equitable interference because of perjury are, first, that, as the case was none the less tried on its merits despite the perjury,¹⁴ to permit a reëxamination would result in flooding the courts with litigation;¹⁵ second, if judgments may be impeached on the ground of perjury, each defeated party may in turn charge the other with perjury in the last suit, so that litigation would never terminate.¹⁶ To sustain the first objection we are driven to say that one against whom a judgment has been gained by fraud in some collateral matter, such as a false promise of compromise, has not had his day in court; but that one who without fault on his part was ignorant of, or unable to establish a fraud which later clearly appeared, has had a fair trial on the merits. Yet

² See Campbell, *Lives of the Lord Chancellors*, 3 ed., 332.

³ *Glover v. Hedges*, 1 N. J. Eq. 113; *Demerit v. Lyford*, 27 N. H. 541.

⁴ *Marine Insurance Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Vilas v. Jones*, 1 N. Y.

274.
⁵ *Hibbard v. Eastman*, 47 N. H. 507.

⁶ *Owen v. Gerson*, 119 Ala. 217.

⁷ *Adams v. Secor*, 6 Kan. 542. Failure to set up a defense through accident or mistake is ground for relief, especially when coupled with concealment by the opposing party. *Currier v. Esty*, 110 Mass. 536; *Herbert v. Herbert*, 49 N. J. Eq. 70.

⁸ *Baker v. Wadsworth*, 67 L. J. Q. B. N. S. 301; *Graves v. Graves*, 132 Ia. 199; *United States v. Throckmorton*, 98 U. S. 61. *Contra*, *Marshall v. Holmes*, 141 U. S. 589. These last two cases seem to constitute an irreconcilable conflict in the Supreme Court. See *Graves v. Faurot*, 64 Fed. 241.

⁹ *Pico v. Cohn*, 91 Cal. 129.

¹⁰ *Maryland Steel Co. v. Marney*, 91 Md. 360.

¹¹ Similarly fraud in the original cause of action, such as forgery, which must be regarded as extrinsic fraud, has been held to vitiate the judgment. *Barnesley v. Powell*, 1 Ves. Sr. 119.

¹² *Jewett v. Dringer*, 31 N. J. Eq. 586; *Perry v. Johnston*, 95 Fed. 322.

¹³ See *Greene v. Greene*, 68 Mass. 361; *Given's Appeal*, 121 Pa. St. 260.

¹⁴ *Friese v. Hummel*, 26 Ore. 145.

¹⁵ *United States v. Throckmorton*, *supra*.

¹⁶ *Greene v. Greene*, *supra*; *Flower v. Lloyd*, 10 Ch. D. 327.

in both cases it is inequitable for the victor to retain his advantage.¹⁷ The second objection is more serious. It is to be noted, however, that before relief is granted on the ground of perjury it is required that the plaintiff have a meritorious defense and that he clearly establish the perjury.¹⁸ Consequences are not always conclusive against a rule of positive law;¹⁹ and here the equity of the case is clear.

It is said that the refusal to enjoin the enforcement of judgments on the ground of perjury is a necessary choice between the evils of injustice in individual cases and the encouragement of vexatious litigation.²⁰ But a party seeking redress is required to exhaust first his legal remedies,²¹ to be free from fault,²² and clearly to establish the perjury²³ without which judgment would not have gone against him.²⁴ It is submitted that with these safeguards against undue litigation the lesser evil is to follow the equity of the matter.

CONDITIONS AGAINST ALIENATION IN INSURANCE POLICIES. — The standard form insurance policies usually provide for avoidance by alienation in one of three ways: (1) by a condition against "sale" or "conveyance," etc.; (2) by a condition against "sale, transfer, or change in title"; (3) by a condition against "change in title or interest." Such conditions, when any doubt arises, are rightly to be construed against the underwriter; although even this latitude is sometimes exceeded by the courts.

To violate the condition against "sale" there must be a parting with all the interest of the assured: if he retains any interest which amounts to an insurable one, the policy is not forfeited.¹ So where the assured conveys property, reserving to himself a life estate, there is no "sale."² Nor is the condition violated by a change of interest as between the partners of a firm, whether one partner withdraws³ or a new one is admitted.⁴ And it has even been held that a sale by the assured of all his interest to the holder of an outstanding tax title who immediately reconveyed the fee was not within the prohibition of the condition, because only a nominal sale.⁵

The condition against "change in title" is construed equally unfavorably to the underwriters. It is violated by transfers between partners,⁶ and by a conveyance to a third party in trust for the assured,⁷ but not by the execu-

¹⁷ *Barnesley v. Powel*, *supra*.

¹⁸ *Briesch v. McCauley*, 7 Gill (Md.) 189. In North Carolina conviction of perjury is required. *Peagram v. King*, 9 N. C. 295.

¹⁹ *Greene v. Greene*, *supra*.

²⁰ *United States v. Throckmorton*, *supra*.

²¹ *Mo. Ry. Co. v. Hoereth*, 144 Mo. 136; *Ponder v. Cox*, 26 Ga. 485.

²² *Carney v. Marseilles*, 136 Ill. 401; *Jewett v. Dringer*, *supra*.

²³ *Glover v. Hedges*, 1 N. J. Eq. 113.

²⁴ *Bloss v. Hull*, 27 W. Va. 503.

¹ *Grable v. German Ins. Co.*, 32 Neb. 645.

² *Clinton v. Insur. Co.*, 176 Mass. 486. See *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me. 44.

³ *Powers v. Guardian Ins. Co.*, 136 Mass. 108; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405. The plaintiff recovered for the entire loss.

⁴ *Blackwell v. Ins. Co.*, 48 Oh. St. 533. In this case the court intimated that the amount of the recovery would be limited to the interest retained by the assured.

⁵ *Kyte v. Insur. Co.*, 144 Mass. 43.

⁶ *Hathaway v. Ins. Co.*, 64 Ia. 229. See *Oldham v. Fire Ins. Co.*, 90 Ia. 225.

⁷ *Ins. Co. v. Jensen*, 56 Neb. 284.

tion of a mortgage by the assured.⁸ Thus it appears that the expressions "sale" and "change in title" are construed in their popular rather than in their technical meanings; for common law mortgages and nominal sales, though technically changes in title, are not popularly regarded as such.

A "change in interest" within the meaning of the condition may be the creation of an equity against the land, as when the assured contracts to convey.⁹ And it has been decided that the death of the assured¹⁰ or the delivery of a deed in escrow will have a like effect.¹¹ But this condition is not always so literally construed. A mortgage by the assured, for instance, is not considered a "change in interest";¹² and a transfer by one partner to his copartners has been treated in the same manner.¹³ Here, also, a sale which is merely nominal does not avoid the policy.¹⁴

The purpose of these conditions is to prevent any temptation to the assured to destroy the insured property when his actual interest is less than the face of the policy. Accordingly, it has been suggested as a test of what change of interest will avoid the policy, that there must be an actual diminution in the interest of the assured. So, when a mortgagee, after insuring, acquires the absolute title, that increase of interest is not within the condition.¹⁵

In a recent case a policy issued to the mortgagor was payable to the mortgagee, who, under a power of sale, conveyed the property to himself. This was held to violate the condition against sale. *Boston Coöperative Bank v. American Cent. Ins. Co.*, 87 N. E. 594 (Mass.). Such a result does not accord with the authorities.¹⁶ Practically, if not technically, the sale to the mortgagee was only a foreclosure, and, though the interest of the assured mortgagor was diminished, the diminution was not such as to tempt him to destroy; hence it should not have avoided the policy. Although extreme in some instances, the decisions show a decided leaning toward liberality of construction. And since the courts generally decline to interpret these conditions literally, the only rule to be laid down is that liberality of construction should be confined within the spirit of the condition, as gathered from the document as a whole.¹⁷

⁸ *Judge v. Ins. Co.*, 132 Mass. 521; *Jackson v. Ins. Co.*, 23 Pick. (Mass) 418. See also *Barry v. Fire Ins. Co.*, 110 N. Y. 1. But on foreclosure the condition is broken. *Commercial Union Assur. Co. v. Scammon*, 102 Ill. 46.

⁹ *Gibb v. Insur. Co.*, 59 Minn. 267.

¹⁰ *Hine v. Woolworth*, 93 N. Y. 75.

¹¹ *Excelsior Co. v. Western Assur. Co.*, 135 Mich. 467.

¹² *Sun Fire Ins. Co. v. Clark*, 53 Oh. St. 414. *Contra*, *Edmonds v. Mutual Ins. Co.*, 1 Allen (Mass.) 311.

¹³ *West v. Insur. Co.*, 27 Oh. St. 1.

¹⁴ *German Insur. Co. v. Gibe*, 59 Ill. App. 614.

¹⁵ *Bailey v. Am. Cent. Ins. Co.*, 13 Fed. 250.

¹⁶ *Kane v. Ins. Co.*, 38 N. J. L. 441; *Chamberlain v. Ins. Co.*, 3 N. Y. Supp. 701.

¹⁷ *Cf. Eaton v. Brown*, 193 U. S. 411. This case is, however, distinguishable on the ground that it involved a will, in which by necessity a greater liberality of construction prevails.

RECENT CASES.

ADVERSE POSSESSION — AGAINST WHOM TITLE MAY BE GAINED — WHETHER LANDLORD IS BARRED BY POSSESSION OF TENANT'S GRANTEE. — The plaintiff leased the premises in question for five years. The lessee soon after made a conveyance in fee to the defendant, who took possession of the property, claiming title by no right except that purported to be conferred by this deed, and remained in such possession as an exclusive owner for the full statutory period. The plaintiff had no knowledge of the lessee's disavowal of the tenancy, and brought ejectment upon notice thereof. *Held*, that under the Wisconsin statutes the defendant, having entered *bona fide* under color of title, has acquired a valid title, regardless of the relation existing between the plaintiff and the defendant's grantor. *Illinois Steel Co. v. Budzisz*, 119 N. W. 935 (Wis.).

Though the principal case is based on Wisconsin statutes, yet the interpretation of these statutes purports to be governed by principles of common law. The general rule is that the possession of a tenant, no matter how long continued, is not adverse, but is in subordination to the landlord's title. *Brandon v. Bannon*, 38 Pa. St. 63. And in England and some states no disclaimer by the tenant is sufficient to forfeit the term and make his claim adverse, unless the landlord so elects. *Doe v. Wells*, 10 A. & E. 427; *Jackson v. Davis*, 5 Cow. (N. Y.) 123. Usually, however, the tenant has power to repudiate the relation and initiate an adverse claim. *Willison v. Watkins*, 3 Pet. (U. S.) 43. This result is held to follow upon a positive disavowal of the owner's title, as soon as notice thereof is brought home to the owner. *Wells v. Sheerer*, 78 Ala. 142. The same rules apply to all persons deriving title from the tenant. Their possession is presumed to be in accordance with the title until some notorious and unequivocal act of exclusion shall have occurred. *Bradt v. Church*, 110 N. Y. 537; *Trustees v. Jennings*, 40 S. C. 168. In the principal case the landlord had no notice of his tenant's fraudulent act. It would seem, therefore, that the decision is not only unfair, but contrary to the authorities. *Bedlow v. N. Y. Floating Dry Dock Co.*, 112 N. Y. 263.

BANKRUPTCY — DISCHARGE — EFFECT OF COMPOSITION AGREEMENT IN EXERCISING STATUTORY CONDITION. — By statute the stockholders of a corporation were made personally liable for its debts after judgment against the corporation and petition of execution unsatisfied. A corporation filed a petition in bankruptcy, and all suits against it were restrained. The plaintiff secured an order permitting him to bring action, but before judgment a composition agreement was accepted by a majority of the creditors against the plaintiff's rights and was ratified by the court. The plaintiff thereupon discontinued his suit. He then sued the stockholders on their statutory liability. *Held*, that he can recover. *Firestone Tire Co. v. Agnew*, 194 N. Y. 165.

This decision overrules that of the lower court discussed in 22 HARV. L. REV. 225.

BANKRUPTCY — JURISDICTION OF FEDERAL COURTS — PROCEEDINGS IN BANKRUPTCY AND CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS. — A creditor filed a claim upon some promissory notes against a bankrupt estate, expressly reserving a security in the form of a mortgage. The trustee attacked both the notes and the mortgage. On appeal to the Circuit Court of Appeals the claim was admitted, but the lien disputed. *Held*, that the Circuit Court of Appeals has jurisdiction on appeal as to the validity of the lien. *Coder v. Arts*, U. S. Sup. Ct., Apr. 5, 1909.

Broadly speaking, all issues directly arising in the settlements of bankrupt estates, including questions between the bankrupt and his creditors and matters of administration, are "proceedings in bankruptcy." *In re Friend*, 134 Fed. 778. But independent issues arising between the trustee and adverse claimants

in regard to property held by the trustee or such claimants are "controversies arising in bankruptcy proceedings." *Hewitt v. Berlin Machine Works*, 194 U. S. 296. In matters of review and appeal this distinction is fundamental. *First Nat'l Bank v. Title & Trust Co.*, 198 U. S. 280. Appeals in "proceedings in bankruptcy" are governed solely by §§ 23, 24, 25 of the Bankruptcy Act. *Cook Inlet Coal Fields Co. v. Caldwell*, 147 Fed. 475. But in "controversies arising in bankruptcy proceedings" the appellate jurisdiction of the higher courts is the same as in other cases outside of bankruptcy. BANKRUPTCY ACT OF 1898, § 24 a. *Dodge v. Norlin*, 133 Fed. 363. A suit which raises the validity of both a creditor's claim and a lien incident thereto has been held to be a "proceeding in bankruptcy" proper. *Cunningham v. German Ins. Bank*, 103 Fed. 932. And the proceeding retains this character, though on the appeal, as in the present case, the lien is the only point in dispute. *Burow v. Grand Lodge*, 133 Fed. 708. But where the sole original claim is the enforcement of a lien, it is a "controversy arising in bankruptcy proceedings." *In re First Nat'l Bank*, 135 Fed. 62.

BANKRUPTCY — PROVABLE CLAIMS — CONTINGENT CLAIMS. — A father and son entered into an agreement whereby the son promised to pay \$8000 to the father's estate five years after the father's death, and the father promised to leave the son certain property at his death. The son went bankrupt and the father attempted to prove his claim against the bankrupt estate. *Held*, that the claim is not provable, as the son's liability is contingent on the father's leaving him the property at death. *In re Hartman*, 166 Fed. 776 (Dist. Ct., N. D. Pa.).

Under the early English statutes contingent claims were not provable against a bankrupt estate. *Tully v. Sparkes*, 2 Ld. Raym. 1546. By special provisions in the federal Bankruptcy Acts of 1841 and 1867 proof of contingent claims was allowed. 5 U. S. STAT. 445; 14 *ibid.* 526. The mere fact alone that such a provision was omitted from the present act would seem to raise an implication that proof of such claims should not be allowed under it. See *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 448. Moreover, some courts in construing the section in the act defining claims which are provable have held that it expressly excludes contingent claims. *Goding v. Rosenthal*, 180 Mass. 43; *In re Chambers, Calder, & Co.*, 2 N. B. N. Rep. 864. But the trend of decision in the federal courts is that contingent claims, in certain circumstances, are provable as "claims on a contract express or implied." *Moch v. Market Street National Bank*, 107 Fed. 897; *In re Smith*, 146 Fed. 923. But even under the express provisions of the earlier acts claims which were dependent upon a contingency so uncertain as to make any calculation of their value practically impossible were not provable. *Riggin v. Magwire*, 15 Wall. (U. S.) 549. There has been a similar holding under the present act, which seems to sustain the principal case. *Dunbar v. Dunbar*, 190 U. S. 340.

BANKS AND BANKING — DEPOSITS — DRAWEE'S LIABILITY ON FORGED INDORSEMENT WHERE THERE IS FICTITIOUS PAYEE. — In pursuance of a fraudulent scheme, A, an employee of the plaintiff, obtained from the latter by false representations numerous checks in payment of goods supposed to have been bought of B, the payee. The plaintiff did not know that he was not indebted to B. A forged B's indorsements and secured payment from the defendant bank, on whom the checks were drawn. *Held*, that the bank must bear the loss. *Jordan Marsh Co. v. National Shawmut Bank*, 87 N. E. 740 (Mass.).

A drawee who pays a check on which the payee's indorsement is forged cannot charge the amount paid to the drawer's account, unless the latter is guilty of negligence which caused the payment. *Shipman v. Bank of New York*, 126 N. Y. 318; *First National Bank v. Whitman*, 94 U. S. 343. The reason for this rule lies in the relation between bank and depositor. The former may disburse only in conformity with the latter's directions, and payment of a check on a forged indorsement is, of course, unauthorized. *Harter v. Mechanics Bank*, 63 N. J. L. 578. In the present case the plaintiff's negligence

in failing to discover the fraud was not the proximate cause of the unauthorized payment. See *Crawford v. West Side Bank*, 100 N. Y. 50. The assumption that the payee was fictitious does not make the check payable to bearer, for the plaintiff was ignorant of this fact. MASS. REV. LAWS, c. 73, § 26. Nor upon this assumption is the drawee relieved of his duty to ascertain the genuineness of indorsements; for the likelihood of deception is not thereby increased. See *Armstrong v. National Bank*, 46 Oh. St. 512. The result reached is just, since, at the time of payment, the bank alone is in a position to detect the forgery.

CONFLICT OF LAWS—RECOGNITION OF FOREIGN JUDGMENT—SUBMISSION BY CONTRACT TO FOREIGN JURISDICTION.—By a clause in a contract between the plaintiff, a French subject, and the defendant, an English subject, the latter agreed that in case of breach the French tribunals alone should have jurisdiction. The defendant having committed a breach, the plaintiff brought an action in France. Service of the writ was in accordance with the French code, effected by leaving it at the office of the Procureur-Général. The writ was also sent to the French consulate in London, and the defendant notified at his residence there. The plaintiff recovered judgment by default and sued the defendant in England on this French judgment. *Held*, that the defendant is liable. *Jeannot v. Fuerst*, 25 T. L. R. 424 (Eng., K. B., March 19, 1909).

For a discussion of a similar case of jurisdiction by contractual consent, see 15 HARV. L. REV. 746; and for the general principles involved, see 20 *ibid.* 323.

CONSTITUTIONAL LAW—IMPAIRMENT OF THE OBLIGATION OF CONTRACT—CHANGE OF REMEDIES.—The United States recovered a judgment against the defendant city based on a contract payable from current taxes. At the time when the contract was made the property taxable was required to be assessed by the city recorder at its full value. Subsequently a state statute required all assessments to be made by a county assessor, whose assessments were to be reviewed, first by the county board, and next by the state board of equalization, and this assessment to be copied by the city recorder for city purposes. *Held*, that, as against the United States, the statute is void as impairing the obligation of its contract by a change of remedy. *City of Cleveland v. United States*, 166 Fed. 677 (C. C. A., Sixth Circ.).

For a discussion of the principles involved, see 19 HARV. L. REV. 133.

CONTEMPT—POWER TO PUNISH FOR CONTEMPT—WHETHER PROCEEDINGS TO PUNISH ARE CRIMINAL PROCEEDINGS.—An injunction was granted against members of a labor union restraining them from interfering with the business of the complainant. In a proceeding against the members of the union to punish them for contempt for a criminal conspiracy to violate the injunction, a deposition given by one of the defendants in answer to a subpoena *duces tecum* was offered as evidence. *Held*, that this is a criminal proceeding and therefore the deposition is inadmissible. *Hammond Lumber Co. v. Sailors' Union of the Pacific*, 167 Fed. 809 (C. C., N. D. Cal.).

Proceedings in contempt are of two classes, civil and criminal. When they are instituted by private individuals for the purpose of protecting or enforcing private rights, either by payment of a fine to the aggrieved party, or by attachment of the contemnor's property, they are remedial and civil in their nature. *Worden v. Searls*, 121 U. S. 14. When, however, as is usually the case, the proceedings are to protect and vindicate the power of the court, they are criminal. A wilful violation of a court's negative injunction is universally held to be a criminal contempt. See *Bullock Electric & Manufacturing Co. v. Westinghouse Electric & Manufacturing Co.*, 129 Fed. 105. And the fact that it has arisen in a civil action in no way tends to change the nature of the proceeding for its correction. *New Orleans v. Steamship Co.*, 20 Wall. (U. S.) 387. In any event contempt proceedings are always criminal in respect to one not a party to the original suit. *Bessette v. Conkey Co.*, 194 U. S. 324. So in all these

cases of criminal contempt the person charged is entitled to notice and a hearing. *Reymert v. Smith*, 5 Cal. App. 380. And a judgment is void if made in his absence. *Ex parte Mylius*, 61 W. Va. 405. The charge must be proved beyond a reasonable doubt. *In re Jose*, 63 Fed. 951. And judgments are subject to review only in the manner provided for criminal cases. *Ex parte Debs*, 158 U. S. 64. Nor can the person charged be forced to testify against himself. *Ex parte Gould*, 99 Cal. 360.

COPYRIGHTS — INFRINGEMENT — MOVING PICTURES OF COPYRIGHTED DRAMA. — The plaintiff owned the copyright of the book "Ben Hur" and also the copyright of a dramatization of it. The defendant reproduced with living models certain scenes in the book and photographed them for use in moving picture machines. He sold the films to theatres for public reproduction. The Copyright Act gives to the author of a book or his assigns the sole right to dramatize it, and to the owner of a copyrighted "dramatic composition" the sole right of producing it publicly. *Held*, that the defendant is liable for infringing both copyrights. *Harper Brothers v. The Kalem Company*, 61 N. Y. L. J. 251 (C. C. A., Second Circ., March, 1909).

It is now settled that an author's right against infringement rests entirely upon statute. *Stern v. Rosey*, 17 App. D. C. 562. A descriptive or dramatic song may be within a statute protecting "dramatic pieces." *Fuller v. The Blackpool, etc., Co.*, [1895] 2 Q. B. 429. And a pantomime is likewise protected. *Lee v. Simpson*, 3 C. B. 871. But a stage dance is not a "dramatic composition" within the meaning of the statute. *Fuller v. Bemis*, 50 Fed. 926. The same has been held of a stage spectacle. *Martinetti v. Maguire*, 1 Abb. (U. S.) 356. But this latter decision was probably influenced by the immoral nature of the spectacle; for, as a general rule, a series of events dramatically represented in a certain sequence is a dramatic composition, whether accompanied by words or not. See *Daly v. Palmer*, 6 Blatchf. (U. S.) 256. The principal case considers it immaterial whether the representation is by actors or by moving pictures. Two considerations are to be counterbalanced: the protection of the author's enjoyment of the fruits of his labor and the securing to others of a fair use of the author's creation. The application of these principles, it is believed, will lead to the result of the present case.

CORPORATIONS — CITIZENSHIP OF CORPORATION — EFFECT ON FEDERAL JURISDICTION OF INCORPORATION IN TWO STATES. — A corporation of state A doing business in state B took out a charter in state B. A citizen of state B sued the corporation, which then petitioned for removal to the federal courts on the ground of diversity of citizenship. *Held*, that for purposes of federal jurisdiction the corporation is a citizen of state A. *Atlantic Coast Line R. R. Co. v. Dunning*, 166 Fed. 850 (C. C. A., Fourth Circ.).

The cases are in confusion as to the effect of incorporation in two states. See *Taylor v. Ill. Cent. R. R. Co.*, 89 Fed. 119; *M. & C. R. R. Co. v. Alabama*, 107 U. S. 581; 13 HARV. L. REV. 597. A corporation is a juristic person whose citizenship depends on the place of incorporation regardless of the citizenship of the shareholders. *Hatch v. Chic., etc., R. R. Co.*, 6 Blatchf. (U. S.) 105. One corporation cannot consistently be a citizen of two states. It may be argued, however, that double incorporation creates two corporations, each the agent of the other. See *Ohio, etc., R. R. Co. v. Wheeler*, 1 Black (U. S.) 286. When two states unite in the initial incorporation, this view is especially applicable. On the other hand, a legislature may by the so-called second incorporation intend merely to extend to a foreign corporation the privileges of citizenship. See *St. Louis, etc., Ry. v. James*, 161 U. S. 545, 562. It may attach as a condition to these privileges the liabilities of domestic corporations in local matters such as taxation. *Southern Ry. v. Allison*, 190 U. S. 326. But such legislation does not actually change the citizenship of the corporation: it still remains a citizen of the state where it was first incorporated. No state can deprive such a corporation of its constitutional right to demand trial in the federal courts. The question of federal jurisdiction may thus depend on whether the legislature intends to create a new corporation or merely to license the old. See *Penn. Co. v. St. Louis & Alton R. R. Co.*, 118 U. S. 290, 296.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — INJUNCTION BY MINORITY STOCKHOLDER AGAINST SALE OF STOCK TO ANOTHER CORPORATION. — A telephone company, in pursuance of an unlawful plan to create a monopoly, bought up a majority of the shares of a competing corporation. A stockholder in the second corporation filed a bill against both corporations, seeking to restrain the transfer of the stock on the books of his own corporation, and also the voting on such stock by the purchaser. *Held*, that the prayer of the bill be granted. *Dunbar v. American Tel. & Tel. Co.*, 87 N. E. 521 (Ill.).

For a discussion of a prior decision of the same case, see 20 HARV. L. REV. 495.

CORPORATIONS — FOREIGN CORPORATIONS — EFFECT OF NON-COMPLIANCE WITH STATUTORY PROVISIONS. — The plaintiff, a foreign corporation, operated a mine without complying with a local statute requiring such corporations to file a declaration of purpose, pay a fee, and appoint an agent to accept service. The statute provided that no action could be brought in the courts within the state unless these requirements were complied with. The plaintiff sued the defendant on a contract made within the state. *Held*, that the plaintiff cannot maintain the action. *Cyclone Mining Co. v. Baker Light & Power Co.*, 105 Fed. 996 (Circ. Ct., D. Ore.). See NOTES, p. 593.

CORPORATIONS — STOCKHOLDERS — DUTIES OWED BY THE MAJORITY. — A majority of stockholders some of whom were directors, bought up outstanding claims against the corporation at a discount, and sued for the full price. They had previously prevented the corporation, by their control of the directors, from itself buying up the claims at discount. The minority stockholders intervened. *Held*, that recovery can be had on the claims only for the actual purchase price. *Young v. Columbia Land, etc., Co.*, 99 Pac. 936 (Ore.). See NOTES, p. 591.

CORPORATIONS — STOCKHOLDERS — REDRESS FOR INDIRECT INJURY TO STOCKHOLDER'S INTEREST. — Corporation A secured control of corporation B, and so managed the latter company as to prevent competition and render worthless its stock. The plaintiff, a stockholder in corporation B, sued corporation A for injury to his interest in the corporation. *Held*, that the demurrer to the complaint be sustained, since the injury complained of is to the corporation and not to the plaintiff stockholder. *Ames v. American Telephone & Telegraph Co.*, 166 Fed. 820 (Circ. Ct., D. Mass.). See NOTES, p. 594.

CORPORATIONS — STOCKHOLDERS' INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — STOCK REGISTERED IN NAME OF ANOTHER. — A, a stockbroker, purchased partially paid stock for B, which was entered on the books of the corporation in A's name. *Held*, that B is liable for assessments. *Brown v. Artman*, 166 Fed. 485 (C. C., E. D. Pa., Dec. 28, 1908).

The facts were as above. *Held*, that A is liable for assessments. *Brown v. Allebach*, 166 Fed. 488 (C. C., E. D. Pa., Dec. 28, 1908).

It is well settled in this country that when stock is registered in the name of one who is not the real or beneficial owner, both the real owner and the registered owner are liable for unpaid subscriptions. *McKim v. Glenn*, 66 Md. 479. So also both the real and the nominal owners are subject to statutory liabilities. *Ohio Bank v. Hulitt*, 204 U. S. 162. The liability of the nominal owner is based on the fact that he is the stockholder of record; that of the real owner on the ground that he is an undisclosed principal. See COOK, CORPORATIONS, § 253. Since the registered owner, however, has the legal title, it would seem better to consider him a constructive trustee for the real owner. On that theory there could be no direct right of the corporation against the real owner. Such is the English view. *Ex parte Bugg*, 2 Dr. & Sm. 452. But the registered owner has a right of exoneration against the real owner, and this right could be reached by the corporation by equitable execution. The American doctrine allowing a direct right against the real owner is therefore a legal short cut to an equitable result.

CORPORATIONS — STOCKHOLDERS' RIGHTS INCIDENT TO MEMBERSHIP — RIGHT OF HOLDER OF VOTING TRUST CERTIFICATES TO APPLY FOR RECEIVERSHIP. — The plaintiff owned voting trust certificates in the defendant corporation. He brought a bill in equity for the appointment of a receiver with out joining the trustees or previously making application to them. The New Jersey Laws of 1896 (p. 298, c. 185) entitled "any creditor or shareholder" to institute proceedings to wind up an insolvent corporation. *Held*, that the plaintiff is a proper party to bring such a bill. *O'Grady v. U. S. Independent Telephone Co.*, 71 Atl. 1040 (N. J., Ct. Err. & App.).

A *cestui* has only a right *in personam* against his trustee. Hence he can proceed in equity to enforce even an equitable demand against a third person only when the trustee is either unwilling or unable to proceed himself. *Morgan v. Kans. Pac. Ry. Co.*, 15 Fed. 55. And it follows that in such cases the trustee is a necessary party. See AMES, CAS. ON TRUSTS, 2 ed., 67. In the ordinary voting trust the stockholder surrenders his certificate representing his right against the corporation to the voting trustees and receives in return a voting trust certificate giving a right against the corporation only indirectly through the trustees. It is therefore impossible to support the principal case in not requiring the trustees to be joined. The New Jersey courts decided that "creditor" as used in this statute means a person entitled to share in the assets. *Gallagher v. Asphalt Co. of Am.*, 65 N. J. Eq. 258. They then deduced that a "stockholder" could be only a person also so entitled, and that one who had surrendered both his beneficial interest and his certificate, although still registered on the corporation's books, was not a stockholder, from which position it was but a short step to the present decision. *Hooper v. Basic Co.*, 69 N. J. Eq. 679.

COURTS — STATE COURTS — JURISDICTION OF ACTION AGAINST UNITED STATES OFFICER. — Land was conveyed to the United States subject to the condition that if it was not used for the purposes of the commission of fish and fisheries it should revert to the plaintiffs. The land was not so used, and the plaintiffs brought a writ of entry in the state court against the tenant in possession, who was the superintendent of the station of the United States fish commission. The defendant contended that his assertion of a right as an officer acting under the authority of the United States deprived the state courts of jurisdiction. *Held*, that the court has jurisdiction. *Fay v. Locke*, 87 N. E. 753 (Mass.).

The United States Supreme Court decided in a recent case that proceedings to enjoin a state attorney-general did not constitute a suit against the state within the prohibition of the Eleventh Amendment. *Ex parte Young*, 209 U. S. 123. The real rationale of that decision seems applicable here: whether the case is maintainable or not depends on whether the defendant officer is personally liable as a principal for his action, or whether the right involved demands that the United States be joined as a necessary party defendant. *Cf.* 21 HARV. L. REV. 527.

COVENANTS RUNNING WITH THE LAND — RUNNING OF BURDEN AGAINST PURCHASER OF COVENANTOR'S TITLE AT FORECLOSURE SALE. — The defendant's predecessor in title covenanted with the plaintiff to maintain a crossing over the plaintiff's right of way to which it was entitled by its franchise. The defendant was a purchaser at a foreclosure sale of a preëxisting mortgage of all its predecessor's property. *Held*, that the covenant does not run with the land. *Evansville, etc., Co. v. Evansville Belt Ry. Co.*, 87 N. E. 21 (Ind. App.). See NOTES, p. 597.

DAMAGES — MEASURE OF DAMAGES — DAMAGES FOR MENTAL SUFFERING IN ACTION FOR CONVERSION. — The defendant company's conductor, after a public altercation with the plaintiff, a passenger, wrongfully took up his commutation ticket. The plaintiff brought an action for conversion. *Held*, that, in addition to the value of the ticket, the plaintiff can recover damages for

the mental anguish suffered because of the publicity of the conversion. *Harris v. Delaware, L. & W. R. Co.*, 72 Atl. 50 (N. J., Sup. Ct.).

Compensation for mental anguish inflicted on the plaintiff may be given whether the act of the defendant is a breach of contract or a tort. Under the general rule as to liability on a contract, it must appear, however, that such injury was in the reasonable contemplation of the parties when the contract was made. See 21 HARV. L. REV. 541. In personal torts redress is generally given, if at all, for any mental suffering resulting from the wrongful act. See 20 HARV. L. REV. 149. There are few cases involving rights in real or personal property where any question of these consequential damages is presented; but in an action of trespass for an unlawful ejectment compensation is generally given for any indignity suffered thereby. *Moyer v. Gordon*, 113 Ind. 282. And damages for mental anguish resulting from the disinterment of a body may be recovered in an action of trespass. *Bessemer Land & Improvement Co. v. Jenkins*, 111 Ala. 135. But as personal property is not of such a character that any sense of personal insult would naturally accompany its deprivation or disturbance, and since mental suffering is therefore improbable, such enhanced damages should not be allowed. This principle has restricted such recovery in actions for trespass to realty. *White v. Dresser*, 135 Mass. 150. Cf. 22 HARV. L. REV. 533. And it is evidently the ground for the distinctions taken in the cases. See 4 HARV. L. REV. 197.

DESCENT AND DISTRIBUTION — DEVOLUTION OF CHARITABLE TRUST PROPERTY ON TERMINATION OF TRUST. — A benefit society consisted of honorary members, who paid subscriptions but could derive no benefits, and benefited members who paid weekly contributions which entitled them to certain annuities. Only persons who had attended a certain school were eligible as benefited members. This school had been closed for over sixty years and only two benefited members survived. The surplus fund was claimed by these members and by the honorary members as a resulting trust. That part subscribed by the honorary members was claimed by the Attorney-General as a charitable trust. *Held*, that the whole fund, after payment of the annuities, belongs to the Crown as *bona vacantia*. *Braithwaite v. Attorney-General*, [1909] 1 Ch. D. 510.

Whether a society of this sort comes within the legal definition of a charity depends upon its purpose as determined by its rules. See *In re Clark's Trust*, 1 Ch. D. 497. Thus, where it is provided that the receipt of benefits shall be conditional upon the poverty of the recipient, the society is a charity. *In re Buck*, [1896] 2 Ch. 727. The funds may then be administered *cy-près*. *Hayter v. Trego*, 5 Russ. 113. But where the purpose is temporary, and those to be benefited are definite, there is a resulting trust for the benefit of the subscribers. *Re Trusts of the Abbott Fund*, [1900] 2 Ch. 326. See 14 HARV. L. REV. 235. Otherwise the funds will be treated as *bona vacantia*. *Cunnack v. Edwards*, [1896] 2 Ch. 679. In the principal case the society was not a charity; for the benefited members were legally entitled to annuities, irrespective of their poverty. But they had no further interests. And since under the statute the subscribers' contributions became the absolute property of the society, there could be no resulting trust. Clearly, therefore, the fund should go to the Crown.

EASEMENTS — MODES OF ACQUISITION — EXTENSION BY ACCRETION TO SOIL OF SERVIENT TENEMENT. — A public street was laid out over riparian land to high-water mark, the easement being secured by eminent domain proceedings. By gradual alluvial deposits the high-water mark was moved seawards. *Held*, that the land acquired by accretion at the end of the street is subject to the easement of the public to the changing high-water mark. *State v. Yates*, 71 Atl. 1018 (Me.).

That a right of way once acquired to navigable water shift with the water-line, is as desirable as that property once riparian remain so. A street dedicated to the public has been held to extend automatically over alluvial deposits,

on the theory that the donor intended a way to the navigable highway, whatever its bounds. *Hoboken Land, etc., Co. v. Mayor, etc., of Hoboken*, 36 N. J. L. 540. And the decision here seems sound in its averment that a street to a shifting water-mark was contemplated, and that allowance was made in the condemnation proceedings for the extension of the soil. No decisions were found in regard to accretion upon property subject to a private right of way; but it seems clear that the creation of rights by grant and covenant are subject to the same inferences as is their creation by dedication and eminent domain proceedings. Cf. *Lockwood v. New York, etc., Railroad Co.*, 37 Conn. 387. Easements, public or private, by prescription, present a harder case; for it is difficult to conceive of constructive adverse use of property which throughout the period of prescription was not in existence.

FEDERAL COURTS — JURISDICTION AND POWERS IN GENERAL — SUIT AGAINST STATE DISPENSARY COMMISSION. — The Legislature of South Carolina created a commission to wind up the affairs of the state liquor business. The complainants, who claimed for liquor sold to the state, sued the commission in the federal court for an accounting, an injunction, and a receivership. *Held*, that the suit is one against the state within the prohibition of the Eleventh Amendment. *Murray v. Wilson Distilling Co.*, U. S. Sup. Ct., Apr. 5, 1909.

This decision reverses the decision of the lower court discussed in 22 HARV. L. REV. 289.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — EFFECT OF CONFORMITY STATUTE ON COMMON LAW RULES OF EVIDENCE. — Rev. Stat. U. S. 1878, § 721, enacts that the laws of the several states, except where the Constitution, treaties, and statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. And § 858, after enumerating certain exceptions, adds that in all other respects the laws of the states shall be the rules of decision as to the competency of witnesses. *Held*, that whether the common law power of a court to compel a plaintiff to submit to a surgical examination be treated as strictly a matter of practice or as involving a question of evidence, in neither case is the federal court bound by the common law decisions of the highest court of the state within which it is sitting. *Chicago & N. W. Ry. Co. v. Kendall*, 167 Fed. 62 (C. C. A., Eighth Circ.).

Rev. Stat. U. S. 1878, §§ 721 and 858, have been construed to include state statutes as to evidence in civil trials. *Conn. Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 254; *Butler v. Fayerweather*, 91 Fed. 458, 460. And there is some authority for treating decisions of the highest state court as equally binding with state statutes. *Stewart v. Morris*, 89 Fed. 290; see *Nashua Savings Bank v. Anglo-American, etc., Co.*, 189 U. S. 221, 228. But these holdings are based upon dicta or cases which deal solely with statutory rules of evidence. See *Ex parte Fisk*, 113 U. S. 713, 720. On the other hand, the federal courts, when presented on appeal with questions of evidence, do not consider state decisions as controlling. Cf. *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 649. The principal case argues that common law rules of evidence are the creation of the courts rather than "laws" within § 721, and that in the absence of statutes federal courts should be independent in this respect. Cf. *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 370. It is believed that on grounds of expediency this technical distinction is justifiable; for the great burden and delay to the federal judiciary otherwise necessary would far outweigh the inconvenience to the local bar under the present rule.

GENERAL AVERAGE — INTERESTS LIABLE TO CONTRIBUTION — WHAT LAW GOVERNS. — The master of a vessel chartered for a voyage from New York to Portugal borrowed money on the security of the freight, for necessary expenses, giving his draft therefor. The vessel became disabled and had to be towed from the Azores to Portugal, for which salvage service a large recovery was had in England. According to New York law the master's draft, or bottomry bond, is

not liable to contribute in general average; by Portuguese law such a draft must contribute. The owner of the vessel paid the loan. *Held*, that the amount received in payment of the draft is chargeable with a proportionate liability in the computation of general average contribution. *Monsen v. Amsinck*, 166 Fed. 817.

General average contribution does not arise from any implied contract, but has become a part of maritime law, adopted from the old Rhodian laws. See *Burton v. English*, 12 Q. B. D. 218. The principal case follows the general rule that the law of the port of destination governs the adjustment and payment of general average. *Loring v. Neptune Ins. Co.*, 20 Pick. (Mass.) 411. If, however, the voyage is completely broken up and the ship and cargo finally part company before reaching the port of destination, the law of the place where the interests are separated governs. *Fletcher v. Alexander*, L. R. 3 C. P. 375. But if the cargo is forwarded by the original master to the port of destination, then its laws govern. *Nat. Board v. Melchers*, 45 Fed. 643. Although it cannot be said that any particular court creates the right to general average contribution, it is only proper, when goods have come within the jurisdiction of a certain court and are subject to general average, that the schedule of distribution as laid down by that court should be recognized everywhere.

HIGHWAYS — REGULATION AND USE — UNDERGROUND LICENSES. — The plaintiff, a public service corporation, was licensed to run pipe lines of complicated structure under the highway. The defendant secured a permit to build a vault under the adjacent sidewalk up to the curb. In the course of this later construction the soil below the plaintiff's pipe line settled, resulting in injury to the pipes. The defendant was free from negligence. *Held*, that the defendant is liable. *New York Steam Co. v. Foundation Co.*, 40 N. Y. L. J. 2723 (N. Y., Ct. App., March 16, 1909).

The natural right of lateral support is incident to an estate in land. *Schultz v. Bower*, 57 Minn. 493. It seems never to have been extended in favor of mere rights in land. Its application to situations like that in the case under consideration would unjustly throw additional burdens on the proposed servient tenement. *Cf. Gayford v. Nicholls*, 9 Exch. 702. And in applying the maxim that no man may so use his own as to injure the property of another the court affords no *ratio decidendi*; for the very question in issue is whether there has been a legal injury. See *Bonomi v. Backhouse*, 27 L. J. Q. B. 378, 388. Many uses of land resulting in damage to neighbors are *damna absque injuria*. *Booth v. Ry. Co.*, 140 N. Y. 267. In these cases liability depends upon the reasonableness of the exercise of the right of property. *Steel Co. v. Kenyon*, 11 Ch. D. 782. The present case seems to be one of first impression. Since the defendant was exercising a mere license, the policy against restraining the natural use of property has no application; and in casting a liability on one who for private rather than for public purposes undertakes work on land not his own resulting in damage to the property of another, the court perhaps reaches a desirable result.

INJUNCTIONS — ACTS RESTRAINED — COLLECTION OF UNCONSTITUTIONAL TAX. — The plaintiff company was engaged in supplying the defendant city with water. The city by an ordinance levied a license tax upon the company, which then sought an injunction from a federal court to restrain its collection as an impairment of the obligation of the original franchise granted by the city. The defendant city demurred. *Held*, that the plaintiff is not entitled to an injunction, since it has an adequate remedy at law. *Boise, etc., Water Co. v. Boise City*, U. S. Sup. Ct., April 5, 1909.

Injunctions against the exercise of the taxing power of the state or federal sovereignty seem clearly unjustifiable where the remedy at law is adequate. In almost all the states, accordingly, the courts will not enjoin the collection of taxes imposed by the legislature on the sole ground of their unconstitutionality. *Mechanics', etc., Bank v. Debolt*, 1 Oh. St. 591. By statute the federal courts are precluded from restraining the assessment or collection of federal taxes on

any grounds. U. S. REV. STAT., 1878, § 3224. Nor will unconstitutional state taxation be enjoined, unless special facts show the insufficiency of the relief at law. *Shelton v. Platt*, 139 U. S. 591. Municipal corporations are not sovereign, and many courts have granted injunctive relief against unconstitutional taxation by them, despite the apparent adequacy of the remedies at law. *Lee v. Mellette*, 15 S. D. 586. In declining to distinguish municipal from state taxation under the federal procedure, the court in the principal case is supported by authority. *Dowd v. Chicago*, 11 Wall. (U. S.) 108. Indeed, as the Judiciary Act in general terms denies equitable jurisdiction to the federal courts "where a plain, adequate, and complete remedy may be had at law," the result seems inevitable. U. S. REV. STAT., 1878, § 723.

INJUNCTIONS — ACTS RESTRAINED — RIGHT OF COURT TO REFUSE INJUNCTION AGAINST PRIVATE NUISANCE. — The plaintiff, a farmer, because of injury to his crops from the fumes of the defendant's smelter, brought a bill for a permanent injunction against the nuisance. The plaintiff's farm had not been rendered unprofitable; while the defendant's smelter had been built at a cost of \$10,000,000, and was one of the chief industries of the state. *Held*, that an injunction will not be granted. *Bliss v. Anaconda Copper Mining Co.*, 167 Fed. 342 (Circ. Ct., D. Mont.). See NOTES, p. 596.

INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — CONDITION AGAINST SALE. — A mortgagor insured his interest for the benefit of the mortgagee. The policy contained a condition against sale. On default by the mortgagor, the mortgagee under a power of sale transferred to himself the absolute title. *Held*, that this transfer avoids the policy. *Boston Coöperative Bank v. American Cent. Ins. Co.*, 87 N. E. 594 (Mass.). See NOTES, p. 602.

INSURANCE — RESCISSION OF CONTRACT FOR FRAUD. — The plaintiff was induced to continue a policy of life insurance by the fraudulent representations of the insurer's agent. *Held*, that on discovering the fraud the plaintiff can rescind, and recover the full amount of the premiums paid. *Refuge Assurance Co. v. Kettlewell*, 126 L. T. 427 (Eng., H. L., March 5, 1909).

This decision affirms that of the Court of Appeal commented on in 22 HARV. L. REV. 134.

JUDGMENTS — EQUITABLE RELIEF — PERJURY A GROUND FOR INJUNCTION. — The plaintiff's testator had made a contract with the defendant, which later was cancelled. Concealing the cancellation, the defendant had secured a judgment against the plaintiff by means of false testimony. The plaintiff who was free from negligence in the court of law prayed for an injunction against the enforcement of the judgment. *Held*, that the plaintiff is entitled to an injunction on establishing the perjury. *Boring v. Ott*, 119 N. W. 865 (Wis.). See NOTES, p. 600.

MUNICIPAL CORPORATIONS — MUNICIPAL PROPERTY — DELEGATION OF POWER TO LEASE PROPERTY. — The charter of the plaintiff city gave the city council power to let or sell city property. An ordinance was passed authorizing a committee to lease certain property upon such terms and conditions as the committee deemed expedient. On February 20 the committee executed a lease to the defendant to take effect June 1. Between these dates a new city government came into office. Suit was brought to test the validity of the lease. *Held*, that the lease is valid. *City of Biddeford v. Yates*, 72 Atl. 335 (Me.).

Powers granted to a city council by statute or charter cannot be delegated to any of its officers or committees without express legislative authority, unless the duty involved is purely ministerial. *Lyon v. Jerome*, 26 Wend. (N. Y.) 485; *People v. Clean Street Co.*, 225 Ill. 470. A duty is ministerial when the mode of its performance is defined with such certainty that nothing remains for judgment or discretion. *Grider v. Tally*, 77 Ala. 422; *State of Mississippi v. Johnson*, 4 Wall. (U. S.) 475. Some courts have not adhered strictly to this definition in deciding a question of delegation of duties. *Hitchcock v. Galveston*, 96 U. S.

341; *Gillett v. Logan County*, 67 Ill. 256. Nevertheless the principal case goes far in holding the duties of the committee to be ministerial when the ordinance giving it the power to lease expressly directed an exercise of discretion. The right to sell land may not be delegated by a city; yet, so far as the question of delegation is concerned, this would seem to be little different from the right to lease. *Beal v. City of Roanoke*, 90 Va. 77. Granting that the delegation was justifiable, the making of a lease by one body to take effect *in futuro* under another body of municipal officers may be valid as a reasonable exercise of the business power of the city. See *Omaha Water Co. v. City of Omaha*, 147 Fed. 1.

PATENTS — INFRINGEMENT — CONTRIBUTORY INFRINGEMENT. — The patentee of a talking-machine had no patent on the sound-producing records used with the machine. The defendant manufactured and sold records solely for the use of purchasers of the talking-machines. *Held*, that the sale of the records may be enjoined, on the ground that the records are non-perishable necessary adjuncts of the main patent. *Leeds & Catlin Co. v. Victor Talking Machine Co.*, U. S. Sup. Ct., April 19, 1909.

This decision affirms that of the Circuit Court of Appeals discussed in 21 HARV. L. REV. 150.

PAYMENT — APPLICATION — INTEREST APPLIED BY LAW TO THE OLDER DEBT. — The obligor on two bonds, given at different dates to the same obligee, who pledged the older without the knowledge of the obligor, paid the obligee interest, without express appropriation by either party. *Held*, that the interest is by law applied on the older debt. *African Banking Corporation v. Blawiekop Garden Co.*, 26 S. Afr. L. J. 135 (Cape Colony, Sup. Ct., Dec. 8, 1908).

For a discussion of the principles involved, see 21 HARV. L. REV. 623.

SALES — RIGHTS AND REMEDIES OF SELLER — MEASURE OF DAMAGES UNDER EXECUTORY CONTRACT OF SALE. — The defendant contracted to purchase a stipulated amount of bar iron, assorted hardware specifications, specifications to be furnished by the defendant. The contract did not require that the plaintiff manufacture the goods, but the defendant knew that it was its intention to do so. Before any of the iron was manufactured the defendant repudiated the agreement and refused to furnish specifications. Bar iron had a well-known market value. *Held*, that the measure of damages is the difference between the contract price and what it would have cost the plaintiff to manufacture and deliver that grade of iron upon which it would have made the least profit under the defendant's option. *W. F. Holliday & Co. v. Highland Iron and Steel Co.*, 87 N. E. 249 (App. Ct. of Ind.).

On non-delivery by a vendor under an executory contract of sale the vendee's damages are usually the difference between the contract price and the market price of the goods at the time and place of performance. *Capen v. The De Steiger Glass Co.*, 105 Ill. 185. When the vendor has acquired the goods by purchase or manufacture, many jurisdictions apply the same rule to a breach by the vendee. *Tufts v. Bennett*, 163 Mass. 398. Other jurisdictions allow the vendor to appropriate the goods to the buyer and recover the price. *Bement v. Smith*, 15 Wend. (N. Y.) 493. By some states this latter rule is limited to goods not readily marketable. *Kinhead v. Lynch*, 132 Fed. 692. See Uniform Sales Act, § 63, Williston, Sales, § 560. But when, as in the principal case, the goods have not yet been acquired by the vendor, he is not bound to obtain and tender them. Indeed it would seem that he cannot continue performance. *Cf. Clark v. Marsiglia*, 1 Den. (N. Y.) 317. In such a case the damages are the difference between the contract price and the cost of manufacture or purchase. *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264; *H. D. Taylor Mfg. Co. v. Niagara Co.*, 52 N. Y. Misc. 356. See Uniform Sales Act, § 64, Williston, Sales, § 580. And when the vendee has an option to choose among different grades of goods it is to be assumed that he would choose those upon which the vendor would realize the least profit. *Kimball Bros. v. Deere, Wells & Co.*, 108 Ia. 676.

SOVEREIGNS — TORT LIABILITY FOR MALICIOUSLY PERSUADING SOVEREIGN TO ACT. — The defendant maliciously persuaded a foreign sovereign to interfere with the plaintiff's business within the foreign territorial jurisdiction. *Held*, that the defendant is not liable in tort. *American Banana Co. v. United Fruit Co.*, U. S. Sup. Ct., April 26, 1909.

The court lays down the dictum that a sovereign makes lawful, by following, the persuasion addressed to it in its jurisdiction. Likewise the sovereign has been held to render incognizable, by ratifying, the previous trespass of its officer upon a foreign subject. *Buron v. Denman*, 2 Exch. 167. For such an "act of state" presents a political question. See 22 HARV. L. REV. 132. So does, possibly, the examination of the causes of such an act. Cf. 2 STEPHEN, HIST. CRIM. L. 65. Analogously, the arguments which prevailed with a domestic legislature cannot be inquired into, to upset a statute. *Attorney-General v. Williams*, 178 Mass. 330. If, then, the persuasion is not examinable at all, the present case has no need of the fictitious relation back. But the act of one subject towards another through the intervening act of a sovereign does not necessarily bring into question the legality of the intervening act; for, in general, to induce legal action may be tortious. See 20 HARV. L. REV. 261. More particularly, the ordinary case of malicious prosecution presents the situation of tortious persuasion to rightful governmental action; and a foreign malicious prosecution may be actionable. *Castrique v. Behrens*, 3 E. & E. 709. On this analogy it would seem that persuasion of a foreign sovereign within its jurisdiction, and all the more if outside, might be the ground of tort liability.

STATES — EFFECT OF GRANT OF CONCURRENT JURISDICTION OVER BOUNDARY RIVERS. — An act of Congress granted to Oregon and Washington concurrent jurisdiction over offenses committed on the Columbia River, whose main channel forms the boundary between the two states. An Oregon statute prohibited fishing with purse nets in the river; while a Washington ordinance provided for the licensing of the use of such nets. A Washington citizen, who had been so licensed, was using the nets on the Washington side of the channel. He was taken by Oregon officials and indicted in an Oregon court under the Oregon statute. *Held*, that Oregon has no jurisdiction. *Nielsen v. Oregon*, 212 U. S. 315. See NOTES, p. 599.

TAXATION — WHERE PROPERTY MAY BE TAXED — TAX ON RECEIPTS ISSUED FOR GOODS WAREHOUSED ABROAD. — The plaintiff state sued to recover taxes on whiskey owned by the defendant. The whiskey was in Germany, but the defendant held German warehouse receipts within the jurisdiction of the plaintiff state. Two lower courts held the tax void under the Fourteenth Amendment, since the situs of the whiskey was outside the state. The highest state court sustained the tax as a tax on the receipts. *Held*, that the record presents only the validity of a tax on the whiskey itself; that the warehouse receipts are only mentioned to prove the whiskey domiciled in Kentucky; and hence the tax is void. *Selliger v. Commonwealth of Kentucky*, U. S. Sup. Ct., Apr. 5, 1909.

The tax on the whiskey itself was invalid; for, regardless of the common practice existing before the Fourteenth Amendment of taxing at the domicile of the owner personality situated outside the jurisdiction, the Supreme Court has decided that the Fourteenth Amendment is thereby contravened. *Del., etc., Co. v. Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194. Accordingly the plaintiff contended that the situs of the warehouse receipts within the state proved that the whiskey itself was domiciled within the state. This could not be true unless the receipts represented the property. Whether a written instrument is a symbol of property is to be determined by the law of the place of issuing. *Ory v. Winter*, 4 Mart. N. S. (La.) 277. Hence the effect of the receipts here was governed by German law, and nothing appeared on the record showing that German law made them symbols of the property. The decision is therefore inconvertible. However, if the receipts were symbols of property, they should be taxable at their

situs. Furthermore, the opinion intimates that a tax on negotiable receipts themselves as representing value within the jurisdiction, owing to their negotiability, might be supportable. *Cf. Stern v. The Queen*, [1896] 1 Q. B. 211; but *cf. Buck v. Beach*, 206 U. S. 392, and cases cited in 3 Beale, *Cas. on Conf. of L.* 132-151.

TORTS — INTERFERENCE WITH BUSINESS — EFFECT OF WRONGFUL MOTIVE. — The defendant, a banker, a man of wealth and influence in the community, maliciously established a barber shop, and used his personal influence to attract customers to his shop from the plaintiff's barber shop, not for the purpose of serving any legitimate end of his own, but for the sole purpose of injuring the plaintiff, whereby the plaintiff's business was ruined. *Held*, that the plaintiff has a good cause of action. *Tuttle v. Buck*, 119 N. W. 946 (Minn.).

This case is noteworthy as squarely deciding that an act may be a tort because of the wrongful motive of the actor. The decision is a strong one, and shows a tendency to recognize a principle that has made its way with much difficulty in the face of some of our greatest authorities. It is interesting to note that this very case, while it presents a novel decision, has often been suggested as a test case by eminent judges and writers. For a full discussion of this principle see 2 HARV. L. REV. 19; 8 *ibid.* 1, 200, 377; 11 *ibid.* 449; 15 *ibid.* 427; 16 *ibid.* 237; 17 *ibid.* 511; 18 *ibid.* 411, 423, 444; 20 *ibid.* 253, 345, 429; 22 *ibid.* 501.

TRANSFER OF STOCK — CONVERSION BY INNOCENT HOLDER OF STOCK CERTIFICATES INDORSED IN BLANK. — The plaintiff bank, to which stock certificates indorsed in blank had been pledged, delivered them to an employé to be surrendered to the pledgor on payment of the loan. The employé through the defendant, a stockbroker, who was innocent of these facts, sold the stock and absconded with the proceeds. The bank sued the defendant for conversion. *Held*, that the defendant having acted on the apparent ownership of the bank's employé should be protected. *National Safe Deposit, Savings, and Trust Co. v. Hibbs*, Chic. Leg. News 296 (D. C., Ct. App., Feb. 2, 1909).

At common law a stock certificate indorsed in blank is a non-negotiable instrument. But for mercantile convenience it has come to be looked on by the courts as "quasi-negotiable," so as to give a *bona fide* purchaser from the agent or pledgee of the owner title by estoppel. *McNeil v. Tenth National Bank*, 46 N. Y. 325. When, however, a certificate is lost or stolen, an innocent purchaser from the finder or thief acquires no title. *East Birmingham Land Co. v. Dennis*, 85 Ala. 565. As to whether an innocent agent or broker in selling for a fraudulent pledgee is guilty as a converter, there is a conflict of authority. It would seem that if an innocent purchaser is protected on the theory of estoppel the principal case was clearly right in giving a similar defense to an innocent agent, since in this respect consideration is immaterial. *Cf. Higgins v. Lodge*, 68 Md. 229. But see *Kimball v. Billings*, 55 Me. 147. Mercantile convenience would be served if stock certificates were made negotiable by statute, so that the holder of a certificate indorsed in blank would have an absolute right to registration on the books of the company instead of merely possessing documentary evidence of that right.

WILLS — EXECUTION — EXECUTOR AS ATTESTING WITNESS. — The attesting witnesses to a will were also named as executors. A statute provided that a will be attested by "credible witnesses"; that any beneficial interest given to an attesting witness should be void unless the will were otherwise sufficiently attested; and that the witness beneficially interested be compellable to testify on the residue of the will. *Held*, that the executors named are not "credible witnesses" within the statute, but that they may be compelled to testify, and will be barred from acting as executors. *Jones v. Grieser*, 87 N. E. 295 (Ill.).

The courts have defined the terms "credible" and "competent," when applied to attesting witnesses, as meaning persons legally qualified to testify in a court of justice. *In the matter of Noble*, 124 Ill. 266. And the competency is to be judged as of the time of attestation. *Hoft v. State*, 72 Tex. 281.

Under the common law rule any interested person was disqualified as a witness in any legal proceeding. See *Sears v. Dillingham*, 12 Mass. 357. Thus one who took under the will could not be a competent attesting witness. *Trotters v. Winchester*, 1 Mo. 292. And the statutes which make interested parties competent witnesses are not applied to attesting witnesses, either because of express limitation in the statute, or under the interpretation of the courts. *Warren v. Baxter*, 48 Me. 193; *Elliot v. Brent*, 17 D. C. 98. It has been held that when an attesting witness is incompetent, as being a beneficiary, the whole will is invalidated. *Holdfast I. Anstey v. Dowsing*, 2 Str. 1253. But by an English statute the gift to the witness was made void and the witness competent. 25 GEO. II. c. 6. This statute has been followed generally in this country. But by the weight of authority an executor is not a person beneficially interested under the will, and is therefore a competent attesting witness and may retain his executorship. *Stewart v. Harriman*, 56 N. H. 25. The opposite holding in the principal case seems unjustifiable.

BOOK REVIEWS.

HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA. By Charles Warren. In three volumes. New York: Lewis Publishing Co. 1908. pp. xiii, 543; 560; 397. 8vo. By subscription. \$25.00.

Although this work deals principally with the Harvard Law School, it has a somewhat larger scope, as the full title indicates. The first volume begins with about two hundred and fifty pages on the legal profession in England and America from the settlement of New England to the foundation of the Harvard Law School; and this discussion includes some account of the beginnings of the profession throughout all the original states, with a description of some early law books and of the mode of education for the bar. There follows an account of the founding and early years of the Harvard Law School, with biographical details as to the first professors and the founders of their professorships; and in this part of the volume there are two chapters on topics of a more general nature—"The Bar and the Law, 1815-1830," and "The Charles River Bridge Case." The second volume brings the history of the Harvard Law School to the present day, and contains also chapters on the development of law throughout the United States, entitled "The Era of Railroad and Corporation Law," "The Federal Bar and Law, 1830-1860," and "New Law, 1830-1860." The third volume gives a list of the students of the Harvard Law School from the beginning, with biographical details as to many. Each volume contains illustrations,—principally Harvard Law School buildings, deceased instructors, and class groups.

It would seem that most persons who have examined these volumes have restricted themselves to pointing out defects. The chief criticisms have been that the price is unreasonable; that the typographical errors—especially in the list of students, with which, unfortunately the author had nothing to do—are too numerous; that the illustrations are not well executed; and that there has been an inclusion of too much matter foreign to the history of the Harvard Law School.

Although those criticisms are just and weighty, they should not be permitted to prevent the recognition of features deserving praise. The chapters on the general state of the law, covering about four hundred pages of the first two volumes, may not be very appropriate in a history of the Harvard Law School; but they contain much interesting matter not easily accessible elsewhere, and with some revision and verification they might serve as a readable and useful historical sketch of the history of the legal profession in the United States. The author's explanation of the inclusion of this material is that the Harvard

Law School grew out of old professional conditions in England and the colonies, and that similar relations between the Law School and the profession exist still. That is true; but the author's introductory chapter of half a dozen pages contains all that is necessary in that direction, and the four hundred pages in question are surplusage, not receiving in their present place the attention to which they are well entitled, holding back the reader who wishes to know something about the Harvard Law School, and even obscuring the merits of the labor which the author has put upon his principal subject. In the seven hundred pages devoted — still with some digressions — to the history of the Harvard Law School, the author shows conclusively that he has made diligent search in the records of the University and in out-of-the-way magazines and pamphlets, and that he has also found some manuscripts hitherto unpublished. He gives many extracts from these sources, and he modestly restricts his own words, as far as practicable, to rather formal statements as to the number of students, the changes in courses and in professorships, and the like. When so many details are to be given, occasional mistakes are inevitable. One extraordinary mistake is the author's statement (vol. I. p. 340) that the first graduating class, that of 1820, consisted of one Dartmouth graduate and five Yale graduates; for the Harvard University Quinquennial, the Harvard Law School Quinquennial, and the third volume of this work concur in showing that the class consisted of one from Dartmouth, one from Yale, and four from Harvard. Yet that error is of no consequence, of course, save as showing the necessity of verifying the statements of even so laborious a writer as the author has shown himself to be.

Notwithstanding the objections justly made to this work as it stands, — and it should really be borne in mind that similar objections seem to be inevitable in the case of any unofficial subscription book, and that a reasonable man finds between the lines of a subscription blank the motto *caveat emptor*, — it should be recognized that the responsibility for the objectionable features rests principally upon the publisher, and that by the rather mechanical processes of omitting the list of students and the redundant general matter, correcting the misprints, and furnishing better illustrations there could be produced a volume which a Harvard Law School man would be glad to place upon his shelves. E. W.

A TREATISE ON THE MODERN LAW OF CORPORATIONS. By Arthur W. Machen, Jr. In two volumes. Boston: Little, Brown and Company. 1908. pp. ccxxv, 816; iv, 817-1798. 8vo.

Almost twenty-five years have elapsed since the second edition of Morawetz's celebrated work on the law of corporations was published. That during this period no branch of the law has been more in the making than the law of corporations goes without saying. Much that was then fluid has now become crystallized; while, still more important, the enormous stress of industrial organization and expansion has called for new principles, and, more frequently, for the application of old rules to new situations. A work that should adequately treat this modern law of corporations has been long overdue. At last the task has been splendidly accomplished. After a most painstaking examination of Mr. Machen's book — for which the reviewer was richly rewarded — we have no hesitation in asserting, at the very outset, that the present treatise is easily the best work extant on the subject. In our opinion it is the worthy successor of Morawetz.

Here at last is a book that is no mere graphophone of digests. The great mass of decisions that have poured from the courts is here passed through the sieve of legal principles, discriminatingly classified and illuminatingly considered. As a result, a profession groaning under the weight of five-deckers and four-deckers of monstrous size will find refreshing comfort in these two moderate-sized volumes. Many causes contribute to this miracle of compression. Primarily, we should say, it is due to Mr. Machen's conscientious concep-

tion of his undertaking. He evidently aimed to produce a law book, and not merchandise.

According to his modest preface, Mr. Machen regards the corporation "as a living organism." That strikes the dominant note of the book. The corporation in these pages is a live phenomenon, presenting concrete, present-day problems for solution. The author has wisely limited his field, and not sought to cover the whole domain of law in any wise touching corporations. He does not treat (1) the relation of the corporation to the state, including the taxation of corporations; (2) foreign corporations; (3) the winding up and dissolution of corporations and related topics (except in so far as these were involved in the chapters on bonds and mortgages); (4) the consolidation and reorganization of corporations. He has further saved space and maintained a proper perspective by avoiding unnecessary discussion of well-settled principles.

While Mr. Machen has written a treatise for the practicing lawyer, and has paid proper respect to the authorities, he has not surrendered his discriminating critical faculty. He recognizes that it is not the true function of a law writer unquestioningly to embalm the cases. See, for instance, his treatment of that enigma of the law, the federal rule of *ultra vires*, particularly the discussion of *Logan Bank v. Townsend*, 139 U. S. 37 (§§ 1032-1047). Space does not permit a reference to the many subjects that are treated with great cogency and unusual felicity. We would mention (and these examples are picked at random) his excellent treatment of the following topics: one-man corporations (chap. xvii.); promoters (chap. vi.); the remedy of a shareholder to sue in his own name (§§ 1142 *et seq.*); voting trusts (chap. xxi.); "watered stock" (§§ 746 *et seq.*); powers of majority (chap. xxii.). And yet, while the whole book is characterized by an independence of thought and freshness of treatment, like a careful scientist Mr. Machen avoids dogmatism or hasty generalization. He is suggestive, but never quixotic. Even his nomenclature is reformative, not revolutionary. And he again disproves the fallacy that a law book, in order to be sound and scholarly, must be dull and uninteresting.

Not that we concur in all of Mr. Machen's views. Thus, we do not subscribe to his position on the liability as partners of members of a defectively incorporated company (§ 293): the view of implied warranty of authority as acting for the corporation is more to our liking (see 19 HARV. L. REV. 389). So, too, we think *Sheffield Co. v. Barclay*, [1905] A. C. 392, is to be rested on the theory advanced by Professor Ames (17 HARV. L. REV. 543), rather than that of implied warranty. We doubt, also, whether the Chancellor's discretion to impose conditions on appointing receivers is the real theory of the rule in *Fosdick v. Schall*, 99 U. S. 235 (see 18 HARV. L. REV. 605). But we confess Mr. Machen has disappointed us even in the traditional efforts of a reviewer at fault-finding. Equally does he confound "insectile criticism" in the fulness and correctness of his citations.

F. F.

HANDBOOK ON AMERICAN MINING LAW. By George P. Costigan, Jr. Hornbook Series. St. Paul: West Publishing Company. 1908. pp. xiv, 765.

It is a genuine pleasure to review a meritorious work. The Handbook on American Mining Law by George P. Costigan, Jr., is of this character. While the work deals primarily with the Mining Law in force in the public domain of the West, the title has been chosen because this branch of the mining law in the United States has become distinctively American. The author has endeavored "to give a comprehensive, well proportioned, and up-to-date treatment of the subject," and a critical examination of the work leads to the conclusion that he is justified in using this language in his prefatory statement. Careful thought, painstaking research, and conscientious effort have entered into the preparation of the text, and the author has not avoided the discussion of unsettled and moot questions, as is the habit of many text-writers. "An exhaustive citation of cases has not been attempted," but we find the citations numerous and in the

main satisfactory. The author does not claim the credit of the forms which are published in an Appendix, but has taken them from Morrison's Mining Rights. The federal statutes and regulations of the Land Department are printed in full in appendices.

While the author's treatment of certain phases of the subject might, from a professional standpoint, appear academic, it must be kept in mind that he is also writing for students, and is therefore entitled to considerable latitude in this respect.

The author has entered into the spirit of our Western mining law, and his treatment of most of its problems is eminently satisfactory. His discussion of the questions involved in Amended Locations and Relocations is particularly praiseworthy.

We are constrained, however, to differ with his conclusions regarding the case of *Lavagnino v. Uhlig*, 198 U. S. 443. This case had the effect of virtually overruling *Belk v. Meagher*, 104 U. S. 279, which had announced that "Mining claims are not open to relocation until the rights of a former locator have come to an end. . . . A relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

For many years and by an unbroken line of decisions, both state and federal, the courts of the mining states held that under this decision a subsequent overlapping location was absolutely void as to the conflicting surface area already embraced within a valid and subsisting senior claim; that the junior locator must either amend or make a relocation, after the senior claim had been abandoned or forfeited, in order to acquire any rights to the conflict area; or, if he did not avail himself of this opportunity, a third locator could step in after the termination of the senior locator's estate and make a location that would prevail as against the prior junior claim.

The Lavagnino case without reference to or comment upon the *Belk-Meagher* decision, announced a doctrine which was diametrically opposed to this old and well-established rule, and which had the effect of making the conflict area inure by gravitation merely to the prior junior claim. The case met with almost universal condemnation on the part of the mining profession, and was severely criticised by the courts of the mining regions.¹

So powerful was this adverse criticism that the United States Supreme Court virtually overruled the Lavagnino doctrine in the recent case of *Farrell v. Lockhart*, 210 U. S. 142, and gave as a controlling reason for such retraction, ". . . the experience of the courts referred to concerning the practice which it was declared had prevailed, . . . the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice . . ."

Mr. Costigan asserts that the Farrell-Lockhart decision is "a backward step," and expresses the belief (note, p. 324) that the Lavagnino doctrine "seems so essentially sound on principle that its rehabilitation ought reasonably to be expected." We cannot concur with him in his belief concerning this doctrine, in view of the decisions and discussions above cited which point out unmistakably the fallacy in the reasoning of the Lavagnino decision. More than all else, we must not lose sight of the fact that the controlling reason which induced the highest tribunal in the land to modify its former opinion and re-establish the doctrine of *Belk v. Meagher*, was the custom and practice in the mining regions of the West, which form the basis of our mining law.

The author is intensely academic where he discusses the possibility of the assertion of extralateral rights on subsequently discovered veins in patented mill-sites and placers (pp. 409-410). It can hardly be contended seriously

¹ See *Lockhart v. Farrell*, 86 Pac. 1077 (Utah); *Ambergris M. Co. v. Day*, 85 Pac. 109, 114 (Idaho); *Nash v. McNamara*, 93 Pac. 405 (Nev.); *Montague v. Labay*, 2 Alaska 515; and *Dufresne v. Northern Light M. Co.*, 2 Alaska 592. See also an able editorial note in 68 L. R. A. 442 and 94 Mining & Scientific Press Discussions, 212, 695, 751.

that the grant of extralateral rights contained in § 2322, U. S. Rev. Stat. is not confined to "mining locations made," in the first instance, "on any mineral vein, lode, or ledge." Mill-sites and placers have no "end lines" within the spirit of the statute. Mr. Costigan certainly would not contend that § 2320 applied to mill-sites and placers, and yet in the original act of 1872, §§ 2320 and 2322 stood in juxtaposition.

It is to be regretted that in a work which gives evidence of such painstaking preparation a more complete index is not provided, and that there should not be more cross references.

There are other criticisms that could be made of Mr. Costigan's work, but they are of a minor character, and it is not the reviewer's desire to do otherwise than convey the impression that this work possesses exceptional merit. Because of its excellence and comparative cheapness, the book should find favor with students of mining law, and it should also have a place in the library of every attorney who has occasion to deal with the many and intricate problems connected with this branch of the law.

W. E. C.

THE LAW OF CHILDREN AND YOUNG PERSONS IN RELATION TO PENAL OFFENSES. By L. A. Atherley Jones and Hugh H. L. Bellot. London: Butterworth & Co. 1909. pp. xxv, 380. 8vo.

This book deals with the British Acts under which young children are guarded against the cruelty or negligence of parents or guardians, and in later life their employment in the mine, the factory, the workshop, and the field is regulated. The law relating to the punishment and reform of juvenile offenders is considered, and their industrial training and general education so far as it is regulated by statute is explained. The book is in the form of a commentary on the Children Act of 1908. This Act, which was passed a year ago by the efforts of Mr. Samuel, the under Secretary of State for the Home Department, has improved and codified the law of children in England and has done for children what our Juvenile Court Acts have done in this country. Its passage is a part of the world-wide movement for the protection and reclamation of the young. It is surely one of the most beneficial tendencies of the new century that statesmen and reformers are turning their attention to the children; for if they are properly brought up most of the problems of adult pauperism and crime can be easily handled.

The work of the authors of this book consists in an annotation of the new Act, section by section. The work is well done, and in parts the authors are able to throw much light, in advance of judicial explanation, upon the meaning of the clauses. While directly adapted for British readers only, the book will be most helpful to all who have to do with the administration of juvenile laws in this country.

J. H. B.

CASES ON THE CONFLICT OF LAWS. By Ernest G. Lorenzen. American Case Book Series. James Brown Scott, General Editor. St. Paul: West Publishing Company. 1909. pp. xxi, 784. 8vo.

There is a growing feeling among lawyers that law books of all kinds—official and unofficial reports, collections, digests, and treatises—have been increasing in number too rapidly. The profession is being overwhelmed by printed matter. It is impossible to keep pace with current legal literature. Yet the existence of a good treatise in a particular field has rightly enough never been considered a reason why another author should not enter the same field; for the opinions and judgments on the law, even of men of equal training, experience, and natural ability, do not always coincide, and the statement of those opinions and judgments—conceding the author to be a man of good training, experience, and natural ability—is always of advantage to the profession.

But the reasons justifying two treatises in the same field do not apply to the case book. The case book is primarily, if not exclusively, for the use of the law student. It is to supply him, in convenient form, with decisions of the courts from the study and discussion of which he can find for himself the fundamental principles of law. If made by a master of the subject, the case book will contain all the leading cases. The collection of a second compiler in the same field — assuming he is a man who will seek the best cases and not merely ones his forerunner has not selected — must necessarily include substantially the same cases. He may arrange his cases in different order, but taken as a whole, in books of equal size, the material will be much the same.

With the spread of the "case system" of instruction, case books were made by teachers of the various subjects included in the ordinary law school curriculum. Before this year there was at least one good case book in almost every subject taught in the schools. It may be open to question, therefore, whether the production of a new series of case books to cover the whole field of law is warranted, whether the effort thus given, in a large measure, to duplicating work might not better have been expended by the same learned gentlemen in the production of good modern treatises for which there is both room and need. But this criticism is general rather than specific.

In the field of Conflict of Laws Professor Beale's collection of cases has since its publication held a very high place, not only because of the merit of the selection, but because of the valuable notes and summary. Far more than any modern treatise it has had influence in the development of this branch of the law. Professor Lorenzen acknowledges the assistance he derived from this collection, and then says: "For want of better or equally good illustrative cases, it has become necessary to reproduce in this work many of the cases used by Professor Beale." Why, then, should the author have devoted his time to the production of a new case book? By this question the reviewer does not mean to intimate even remotely that Professor Lorenzen has not done original work. Far from it. He has made a different division of the subject, the advantages of which the reviewer — long familiar with Professor Beale's book — cannot at once appreciate, but which Professor Lorenzen's experience in teaching no doubt dictates. He has unquestionably put in his text or notes all the important and noteworthy cases of recent years in the field of Conflict of Laws. The footnotes which are added to many of the cases are scholarly and valuable. They contain not only American and English cases in accord and *contra* the case in the text, but also statements of the Continental law as represented in the jurisprudence of France, Germany, and Italy, together with collections of decisions of the courts of those countries. The value of familiarizing the student with Continental law in this field cannot be overestimated. The Conventions of the Hague relating to Conflict of Laws — the importance of which must soon be felt — are appended. A serviceable index adds to the usefulness of the book.

We cannot but regret that the learning and industry of Professor Lorenzen, clearly seen in his collection of authorities and in his notes, was not applied to the production of a work that would be of more general use to the profession.

One criticism of the physical make up of the book may be ventured. If, instead of part number and chapter number, chapter and section numbers were put at the tops of the pages, and if instead of page after page headed "General Provisions," "Particular Subjects," and similar titles, the names of the cases were printed there, the book would be easier to use. S. H. E. F.

PROCEDURE IN INTERSTATE COMMERCE CASES. By John B. Daish. Washington: W. H. Lowdermilk & Co. 1909. pp. xiv, 494. 8vo.

This book should be in the hands of every one who practices before the Interstate Commerce Commission. It contains practically all the requisite

matter sufficiently well arranged to be of immediate service. It does not pretend, however, to go far into the substantive law involved. Indeed, there is practically no discussion of the theory of the regulation of railroad rates. As a special book for the practitioner, it has the peculiar value of being the work of one versed in what he is describing.

B. W.

A TREATISE ON GUARANTY INSURANCE AND COMPENSATED SURETYSHIP.

By Thomas Gold Frost. Second Edition. Revised and Enlarged. Boston: Little, Brown and Company. 1909. pp. liv, 770. 8vo.

This work follows in the main the outline of the first edition which was discussed in 15 HARV. L. REV. 759. About two hundred and fifty pages have been added and the later decisions are discussed. The subject of Official Bonds is treated under a separate head, and the chapter on Contract Insurance is greatly amplified. The subject of subrogation also receives more extended treatment, and included in the same chapter with it is a short discussion of the rights of contribution and exoneration.

The faults commented upon in the review of the first edition are apparent in this revision. The author treats the contract of the compensated surety as one of insurance and not of suretyship. Though it is true that some of the cases do refer to the contract as one of insurance, which, in a sense, it is, yet there seems to be no more justification than there was at the time the work first appeared, so far as the later decisions show, for discussing the subject with such little reference to the general principles of suretyship. The text abounds with extended statements of the facts of certain cases and long excerpts, sometimes of two and three pages, from opinions with but little comment by the author in most instances. There is also frequent repetition, an instance of which is where section 28 of over two pages is repeated practically verbatim in section 198. The author's narrow treatment of his general subject seems hardly to warrant so much space as he gives to it or such extensive discussions of the facts of individual cases.

S. ST. F. T.

DIE GESCHICHTE DES ENGLISCHEN PFANDRECHTS. By Dr. jur. Harold

Dexter Hazeltine, Reader in English Law an der Universität Cambridge.

Breslau: Verlag von M. & H. Marcus. 1907. pp. xxviii, 305. Appendix.

This treatise on the history of English mortgage law was written under the direction of Dr. Otto Gierke, Professor of Law at the University of Berlin, which circumstance is alone sufficient to stamp the work of Mr. Hazeltine as profound and illuminating. The need of an elaborate investigation into the development of English mortgage law has many times been felt by students of jurisprudence; its sources and growth have never before been adequately studied. In this field, therefore, Mr. Hazeltine is a pioneer. His articles in the HARVARD LAW REVIEW (vol. XVII. pp. 549-557 and vol. XVIII. pp. 36-50) summarize well the portion of the volume which treats of the gage of land in Mediæval England and are, moreover, good examples of the author's fine historical method.

E. D. B.

THE LAW OF REAL PROPERTY. By Raleigh Colston Minor. In two volumes. University of Virginia: Anderson Brothers. 1908. pp. vi, 1038, 1038-1835. 8vo.

The law of real property is for the most part so ancient and well settled, and its rules have been stated and restated with such lucidity and insistence by the ablest common law minds since epochs immemorably antique, that one can almost assume that an intelligent man having access to the authorities will produce a sound statement of the law. Mr. Minor's book is, in fact, a clear,

sound, and conservative restatement of the truths already elucidated by his predecessors. It is similar in size and general scope to Tiffany on Real Property, but has the advantage of being published five years later and of having had Tiffany in part as a model—a model which might in some cases have been followed more closely with advantage.

Minor's text is fuller than Tiffany's, largely owing to its greater eloquence, but the foot-notes are much more meager—only half the number of cases being cited in the entire work. Special attention is given to the Virginian law, and constant reference is made to Minor's Institutes, an obscure book written by a namesake of the author, on whose work the new treatise purports to be founded. The book is equipped with a good index, full enough to make it really useful for the practicing lawyer as distinguished from the reader of law. For lawyers residing in Virginia and for students intending to practice there, the book will doubtless be a most valuable assistance. For the residents of other states it is inferior, in the clearness of its analysis and the exhaustiveness of its citations, to Tiffany. To be sure, it is of more recent date, but the law of real property is now so well settled and subject to so few changes that the lapse of five years does not appreciably impair the value of a book published in 1903, nor justify the addition of another book to the already stupendous nightmare of legal bibliography.

E. R. JR.

THE CRIMINAL RESPONSIBILITY OF LUNATICS. By Heinrich Oppenheimer. London: Sweet and Maxwell, Limited. 1909. pp. vi, 275.

The defense of insanity—thanks to newspaper trials of homicide cases and the willingness of some lawyers and some doctors to prostitute their learning and ability to aid the guilty to escape—has come to be looked for in almost every trial for murder, where the identity of the actor is known and the plea of self-defense cannot be raised. The defenses evolved by lawyers and the theories propounded by the doctors have at times been so bizarre, and the results achieved at times have seemed to be such obvious miscarriages of justice, that the layman and even the lawyer have thought that there must be something wrong with the law or with the rules for determining the criminal responsibility of lunatics.

Dr. Oppenheimer has undertaken to consider the rules of law governing such responsibility that are applied in the different countries of the civilized world. He brings to his task excellent qualifications, being both a trained lawyer and a trained doctor. This study in comparative law is brief, being merely a thesis approved for the degree of doctor of laws; but it is clearly reasoned and it is suggestive.

Dr. Oppenheimer points out that much of the confusion that exists is due to the fact that two distinct questions are unfortunately treated as one or as necessarily bound together. The question of a man's sanity is one,—a purely medical question; the question of a man's responsibility, or amenability to conviction or punishment, is another,—a purely legal question.

The law cannot determine when a man is insane. That purely medical question ought in every case to be determined first. The law can determine what insane men shall be held responsible. Here the law can adopt many rules, lying between the Chinese rule on the one extreme by which the criminal lunatic is treated just as an ordinary wrongdoer, and the French rule on the other extreme by which the insane criminal is held irresponsible.

Unfortunately, Dr. Oppenheimer does not reach any definite conclusion. After a review of the systems of all the civilized countries of the world, he decides that there is none which offers any advantages to the so-called "knowledge test" of the English law. He believes it is "as safe and satisfactory a working rule as has yet been devised."

He does reach one conclusion with which most will agree. He believes that the field of the lunacy experts should be restricted, and that they should cease

to be employed by the parties. If appointed by the court, they would not be under the temptation of becoming partisans, and after becoming familiar by reason of such employment with the rules of evidence and the distinction between things relevant and irrelevant, they could be trusted to tell their stories and give connected and logical accounts of the prisoner's mental state, "instead of scraps of information with which, under the present system of question and answer, they have to be contented."

At the end of the thesis a good bibliography is added.

S. H. E. F.

- THE LAWS OF ENGLAND.** By the Right Honorable the Earl of Halsbury and other lawyers. In about 20 volumes. Volume VI. Philadelphia: Cro-marty Law Book Company; London: Butterworth and Company; Rochester: Lawyers Coöperative Publishing Company. 1909. pp. cxxxi, 499. 8vo.
- FEDERAL EQUITY PRACTICE.** By Thomas Atkins Street. In three volumes. Northport, Long Island, N. Y.: Edward Thompson Company. 1909. pp. xc, 613; 614-1313; 1314-2104. 8vo.
- A DIGEST OF THE LAW RELATING TO PRIVATE TRUSTS AND TRUSTEES.** By Walter Gray Hart. London: The "Law Notes" Publishing Offices. 1909. pp. xxiv, 464. 8vo.
- THE STUDENTS' SUMMARY OF THE LAW OF CONTRACT.** By J. G. Pease and A. M. Latter. London: Butterworth and Company. 1909. pp. lii, 416. 12mo.
- CASES ON DAMAGES.** Selected from decisions of English and American Courts. By Floyd R. Mechem and Barry Gilbert. American Case Book Series. James Brown Scott, General Editor. St. Paul: West Publishing Company. 1909. pp. xxiii, 626.
- THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT.** By Samuel Williston. New York: Baker, Voorhis and Company. 1909. pp. cix, 1304. 8vo.
- QUESTIONS AND ANSWERS FOR BAR-EXAMINATION REVIEW.** By Charles S. Haight and Arthur M. Marsh. Second Edition. New York: Baker, Voorhis and Company. 1909. pp. lii, 585. 8vo.
- A HISTORY OF ENGLISH LAW.** By W. S. Holdsworth. In three volumes. Boston: Little, Brown and Company. 1909. pp. xlv, 460; xxxi, 572; xxxviii, 532. 8vo.
- ELEMENTS OF THE LAW OF DAMAGES.** By Arthur George Sedgwick. Second Edition, Revised and Enlarged. Boston: Little, Brown and Company. 1909. pp. xxxv, 368. 8vo.
- A TREATISE ON THE LAW OF TRUSTEES IN BANKRUPTCY.** By Albert S. Woodman. Boston: Little, Brown and Company. 1909. pp. xci, 1103.
- A TREATISE ON THE LAW OF REAL PROPERTY.** By Alfred G. Reeves. In two volumes. Boston: Little, Brown and Company. 1909. pp. cxxiv, 788; v, 789-1659. 8vo.

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